In the Supreme Court of the United States

OCTOBER TERM, 1991

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that statements made in congressional committee reports and hearings on lump-sum appropriations bills, together with general notions of the federal "trust" responsibility for Indians, constitute "law to apply" for purposes of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 (a)(2), of agency action affecting Indians.

2. Whether the court of appeals erred in holding that an agency's decision to reallocate funds and personnel from a discretionary pilot project providing certain health-related services for Indians in order to provide other health-related services constitutes rulemaking subject to the notice and comment requirements of the APA, 5 U.S.C. 553.

PARTIES TO THE PROCEEDINGS

Petitioners are Everett R. Rhoades, M.D., Director of the Indian Health Service; Louis W. Sullivan, Secretary of Health and Human Services (substituted as a party pursuant to Rule 35.3 of this Court); the Department of Health and Human Services; Manuel Lujan, Jr., Secretary of the Interior (also substituted pursuant to Rule 35.3); Eddie F. Brown, Assistant Secretary of the Interior—Indian Affairs (also substituted pursuant to Rule 35.3); the Department of the Interior; and the United States.

Respondents are Grover Vigil and Charlene Vigil as general guardians and next friends for Ashley Vigil, a minor; Kee Sandoval and Judy Sandoval as general guardians and next friends for Kristofferson Sandoval, a minor; Angela C. Allen, as general guardian and next friend for Angelo Allen, a minor; and all other persons similarly situated.

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The Solicitor General, on behalf of Everett R. Rhoades, M.D., Director of the Indian Health Service, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 953 F.2d 1225. The opinions of the district court (App., *infra*, 17a-45a, 46a-56a) are reported at 746 F. Supp. 1471.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1992. On April 3, 1992, Justice White extended the time for filing a petition for a writ of certiorari to and including May 14, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Snyder Act, 25 U.S.C. 13; the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq.* (1982); the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*; and the appropriations acts for the Indian Health Service for fiscal years 1980 and 1985, Act of Nov. 27, 1979, Pub. L. No. 96-126, Tit. II, 93 Stat. 954, 973-974, and Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, 98 Stat 1837, 1863-1865, are reproduced at App., *infra*, 57a-73a.

STATEMENT

1. The Indian Health Service (IHS), an agency within the Department of Health and Human Services, receives annual lump-sum appropriations from Congress to fund health services programs for Indians. Those appropriations are allocated and expended by IHS under the authority of the Snyder Act, 25 U.S.C. 13, and the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq.* The Snyder Act provides in part that the agencies responsible for Indian affairs "shall direct, supervise, and expend such moneys as Congress may * * * appropriate, for the benefit, care, and assistance of the Indians * * * for the * * * relief of distress and conservation of health." 25 U.S.C. 13.[1] Title II of the IHCIA author-

[1] The Snyder Act initially applied only to expenditures by the Bureau of Indian Affairs (BIA), an agency within the Department of the Interior. The Indian Hospitals and Health Facilities Act (Transfer Act), 42 U.S.C. 2001, transferred responsibility for Indian health from the BIA to the Department of Health and Human Services.

izes supplemental appropriations in a number of broad health-related areas, including patient care, field health, and mental health. 25 U.S.C. 1621.

The IHS has adopted general regulations implementing its authority to provide health services to Indians. Those regulations state that "[t]he services provided to any particular Indian community will depend upon the facilities and services available from sources other than the [IHS] and the financial and personnel resources made available to the [IHS]." 42 C.F.R. 36.11(c); see also 42 C.F.R. 36.12(a) (services will be provided to qualified persons of Indian or Alaska Native descent "to the extent that funds and resources allocated to the particular Health Service Delivery Area permit").

In 1978, the IHS allocated approximately $292,000 from its fiscal year 1978 appropriations to the IHS headquarters' mental health branch in Albuquerque, New Mexico, for development of a pilot program for handicapped children. App., *infra*, 4a-5a. That program, which became known as the Indian Children's Project (ICP), developed into a joint endeavor by the IHS and the BIA. Between 11 and 16 staff members were assigned to the ICP to provide monitoring and assessment services for handicapped Indian children primarily in the southwestern United States.[2]

[2] The ICP staff was based in Albuquerque. Staff members visited reservation communities about once a month. The services provided included identification and diagnosis of mentally handicapped children, development and monitoring of their treatment plans, "consultative visits" in children's home communities, and training. App., *infra*, 12a, 19a. The ICP personnel generally did not, however, perform as the primary furnishers of rehabilitative and other services to the children. Rather, because ICP staff visited communities no more than once a month, children monitored by the ICP staff

The ICP originated in part in an effort to assess the need for a separate treatment center for handicapped Indian children. App., *infra*, 5a; *Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before the Subcomm. on the Dep't of the Interior of the House Comm. on Appropriations*, 96th Cong., 1st Sess. Pt. 8, at 245-252 (1979). Although the IHS included $3.5 million for such a center in its total budget request for fiscal year 1980, Congress did not specifically include funds for that purpose in IHS's appropriation Act for that year. The relevant committee reports did state, however, that the House Committee had provided an increase of $300,000 in total funding for Indian health services in order to permit expansion of the handicapped children's program into a nationwide effort. See H.R. Rep. No. 374, 96th Cong., 1st Sess. 82-83 (1979); S. Rep. No. 363, 96th Cong., 1st Sess. 91 (1979). The ICP thereafter remained a regional pilot project based in the southwest and serving reservation communities in New Mexico, Southern Colorado, and the Navajo and Hopi Reservations. IHS continued to fund the ICP from its annual lump-sum appropriations throughout the period from 1980 to 1985.

By 1985, IHS management had decided that the staff efforts then being devoted to the ICP could be more effectively utilized within the IHS system if they were devoted instead to providing technical assistance and consulting services to all IHS areas and service units on a nationwide basis. App., *infra*, 2a, 20a. Accordingly, IHS decided to terminate the more

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had to seek primary therapy from among whatever services were available to them at local IHS facilities, at their schools, or from other sources, such as Medicaid and state programs. Deposition of Ann Galoway-Leigh at 104-105, 130-131.

narrowly focused ICP and to reallocate its resources to the nationwide effort. The decision to discontinue direct patient consultative services through the ICP was announced in a memorandum dated August 21, 1985, from the acting ICP clinical and administrative directors to IHS Area Offices, IHS service units, and all referral sources. Gov't C.A. Add. Exh. 8.[3]

2. Subsequently, respondents brought this action in the United States District Court for the District of New Mexico seeking declaratory and injunctive relief. The complaint alleged that the termination of the services offered to handicapped children through the ICP violated, inter alia, the "federal trust responsibility to Indians, the Administrative Procedure Act (APA), * * * the Snyder Act, * * * [and] the Indian Health Care Improvement Act." App., *infra*, 2a-3a.

On July 6, 1990, the district court granted summary judgment for respondents. App., *infra*, 17a-45a. The court held that the IHS's decision to terminate the ICP, and to reallocate its resources to a nationwide effort to ensure the availability of services to all handicapped Indian children, was not "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2). The court believed that the statutes involved, although broadly worded—together with Congress's awareness of the ICP when it authorized lump-sum appropriations for the IHS—provided "ample" law to permit a court to assess the IHS's

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[3] As of August 1985, the staff was following 426 children. App., *infra*, 20a. The staff conducted concluding consultations with parents, professionals, and others concerned with each of those children. Deposition of Mary Ellen Sanchez 44-46. The BIA continues to follow handicapped children in the ICP service area (and elsewhere) pursuant to its educational responsibilities. App., *infra*, 6a.

action. App., *infra*, 30a. Thus, the court held that the action was judicially reviewable.

The court further held that the decision to terminate the ICP constituted administrative rulemaking, reasoning that the Administrative Procedure Act (APA) "broadly defines an agency rule to include nearly every statement an agency may make." App., *infra*, 38a (quoting *Batterton* v. *Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980)). The court rejected the argument that the termination decision was exempt from the notice-and-comment requirement because it involved merely an "interpretive" rule or "general statement of policy." See 5 U.S.C. 553(b)(A). The court held that because the termination had significant effects on private interests, it was a "legislative rule" subject to the notice-and-comment provisions of the APA, 5 U.S.C. 553, and that the IHS's decision to terminate the ICP was therefore procedurally invalid because the agency had not published its decision for public comment. App., *infra*, 38a-44a.[4]

3. The court of appeals affirmed. App., *infra*, 1a-16a. The court acknowledged that manageable standards for reviewing IHS's decision to terminate the ICP were "difficult to find" in the Snyder Act and the IHCIA, observing that the ICP "appears to have been created at the discretion of the IHS" and that respondents had "not cited any statute or regulation which even refers to the Project or provides specific standards for reviewing its termination." App., *infra*, 10a-11a. But the court nonetheless held that there was sufficient "law to apply" to permit judicial review. Pointing to congressional hearing testimony and committee reports accompanying IHS's lump-sum appropriations, the court first concluded that Congress "was informed of" and "intended to fund" the ICP, "albeit through general appropriations." App., *infra*, 13a. In addition, the court believed that the "special relationship" between the Indian people and the United States " 'suggests that the withdrawal of benefits from Indians merits special consideration.' " App., *infra*, 13a, 14a (quoting *Vigil* v. *Andrus*, 667 F.2d 931, 936 (10th Cir. 1982)). In the court's view, this "special consideration," coupled with "Congress' recurring budgeting recognition of the Project," provided "an appropriate backdrop for judicial review" to determine whether IHS's action "ultimately does redound to the 'benefit, care and assistance' of Indians." App., *infra*, 14a-15a (quoting *id.* at 31a, and the Snyder Act, 25 U.S.C. 13).

The court of appeals also held that IHS was required to follow notice-and-comment rulemaking procedures before terminating funding for the ICP. The court believed that this holding was required by *Morton* v. *Ruiz*, 415 U.S. 199 (1974), which it understood to stand for the broad proposition that "notice and comment procedures should be provided any time the government 'cuts back congressionally created and funded programs for Indians' even when the Indians have no entitlement to the benefits." App., *infra*, 15a (citing *Vigil* v. *Andrus*, 667 F.2d at 936).

REASONS FOR GRANTING THE PETITION

The court of appeals' reasoning fundamentally distorts both appropriations law and administrative law, and is inconsistent with decisions of this Court and of the lower courts. If allowed to stand, the decision

[4] After further briefing, the district court issued an additional memorandum opinion and order directing IHS to reinstate the program. App., *infra*, 46a-56a. A restored ICP is currently in place.

below will impose substantial and unjustifiable burdens on the ability of the Indian Health Service and the Bureau of Indian Affairs to exercise the discretion and flexibility vested in them by Congress to address the needs of Indians and to allocate scarce resources among various programs in light of changing circumstances.

The court's holding that precatory statements made in congressional committee reports and hearings can supply "law to apply" sufficient to permit judicial review of an agency's allocation of lump-sum appropriations conflicts with *International Union, UAW* v. *Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985), and with the fundamental principle that Congress makes law only through formal action of the full House and Senate and presentment to the President, not by conducting hearings or drafting committee reports. The result is to elevate legislative history to the status of an Act of Congress, and in so doing to rob the IHS and other agencies of the latitude and discretion necessary to administer Indian programs. Under the decision below, even the most mundane agency funding and resource allocation decisions will apparently be subject to judicial review if the relevant program or project is so much as mentioned—as many are—in a committee report or congressional testimony.

In addition, the decision below transforms the federal "trust" responsibility for Indian property into a substantive legal constraint on the discretion of federal agencies generally, wholly divorced from any statutory or regulatory requirements or from any showing of an impact on vested property rights. By holding that this "trust" notion creates substantive "law to apply" for purposes of judicial review of agency decisionmaking, and by imposing a novel and

far-reaching notice-and-comment requirement on all federal agency action affecting services to Indians, the court of appeals has expanded the federal "trust" responsibility far beyond its legitimate bounds, in a manner contrary to the decisions of this Court.

For the foregoing reasons, review by this Court is warranted.

1. a. Agency actions are exempt from judicial review where "agency action is committed to agency discretion by law," 5 U.S.C. 701(a)(2), as in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). See also *Webster* v. *Doe*, 486 U.S. 592, 600 (1988); *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."). The court of appeals found "law to apply" in this case by looking in part to "[c]ongressional hearings testimony and reports" indicating awareness and approval by congressional committees of the IHS's continued funding of the ICP. App., *infra*, 11a. The lump-sum appropriation provisions in the bills to which those materials pertained contained no mention of the ICP. See, *e.g.*, App., *infra*, 67a-73a. Thus, the effect of the court's holding is to elevate congressional hearings and committee reports to the level of binding law, in direct disregard of this Court's admonition that those materials do not have the "force of law." *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1545 (1991). See also *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1342 (1992) (Thomas, J, concurring in part and in the judgment) ("committee reports and floor state-

ments * * * are not law"). "[T]he Constitution is quite explicit about the procedure that Congress must follow in legislating," *American Hospital Ass'n*, 111 S. Ct. at 1545, and committee hearings and reports are not the operative end-product of that procedure. Cf. *INS* v. *Chadha*, 462 U.S. 919 (1983). Accordingly, the court of appeals erred in attributing binding and continuing legal force to those materials, which concerned annual appropriations laws that have long since expired.

In *International Union, UAW* v. *Donovan*, 746 F.2d 855 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985), the District of Columbia Circuit expressly rejected the suggestion that legislative history could provide "law to apply" so as to permit judicial review of an agency's allocation of a lump-sum appropriation among various programs:

> [L]egislative history is relevant to our inquiry—but not directly relevant. As the Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation." *Train v. City of New York*, 420 U.S. 35, 45 * * * (1975). The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be on the text of the appropriation.

746 F.2d at 860-861. The decision below, to the extent it authorizes reliance on legislative history as a source of law to apply in reviewing agency action concerning the expenditure of funds under a lump-sum

appropriation, conflicts with *International Union*. Accordingly, review by this Court is warranted.

b. The court of appeals did not rest its reviewability holding exclusively on legislative history. The court also relied on (i) its view of a "special relationship" between the federal government and the Indian people (which it alternatively termed a "guardian-ward," "trust," or "fiduciary" relationship), and (ii) the fact that the Snyder Act authorizes the expenditure of funds for "the relief and conservation of health" of Indians. App., *infra*, 13a-15a. Neither, however, provides "law to apply."

"It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). That federal responsibility, however, "do[es] not create property rights where none would otherwise exist but rather presuppose[s] that the United States has interfered with existing tribal property interests." *Ibid.* In this case, there are no existing Indian property rights at stake that could invoke a federal "trust" responsibility.[5] Funds allocated under the Snyder Act are gratuitous appropriations, not trust funds belonging to the Indians. *Scholder* v. *United*

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[5] Indeed, even where Indian property rights *are* implicated, the term "trust" is something of a misnomer. "[T]he fiduciary relationship springs from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.'" *Pawnee* v. *United States*, 830 F.2d 187, 192 (Fed. Cir. 1987) (quoting *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983)). Thus, where the federal government has fully complied with all applicable statutes, treaties, regulations, and contractual provisions in dealing with Indian property interests, no claim for breach of "trust" can be stated. *Pawnee*, 830 F.2d at 192.

States, 428 F.2d 1123, 1129 (9th Cir.), cert. denied, 400 U.S. 942 (1970); compare *United States* v. *Dann*, 470 U.S. 39, 49-50 (1985). In distributing such funds, "[t]he United States acts in no more a fiduciary capacity * * * than it does in distributing *any* funds appropriated by Congress." *James* v. *Department of Health & Human Servs.*, 12 Indian L. Rep. (Am. Indian Law Training Program) 3097, 3100 (D.D.C. Aug. 14, 1985).

The court of appeals ignored these limitations on the judicially cognizable "trust" responsibility of the federal government, and instead invoked generalized notions of a "special relationship." It held that the United States owes a general duty of "fairness" to Indian peoples that imposes substantive constraints on the discretion of the Executive Branch even in the absence of any Indian property interests or other vested rights—and even in the absence of any statute in which Congress has chosen to embody such a duty and to codify standards that might be enforced by a court.[6] This extra-statutory and unanchored principle of judicial review has an almost limitless potential for justifying judicial second-guessing of Executive Branch decisionmaking affecting Indians, and is unsupported by this Court's cases. It should not be permitted to stand.

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[6] The court did not explain how such a duty could be articulated so as to provide judicially manageable standards for decision. In this case, for example, the IHS terminated the ICP so as to utilize the available funds and resources in a manner that would benefit Indian children nationwide rather than solely in the southwest. What is "fair" in such a circumstance is a judgment that courts are ill suited to make. Cf. *Hoopa Valley Tribe* v. *Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) (holding that there is no federal trust responsibility that can be discharged to the benefit of some Indians but at the expense of others).

The Snyder Act's vague and general language likewise furnishes no "law" for a court to apply in a case such as this. That Act simply *authorizes* the IHS and the BIA to expend whatever funds Congress may appropriate for the "benefit, care and assistance" of Indians in a number of broad subject areas, including "the relief and conservation of health" of Indians. It does not *require* funds to be spent for any particular purpose or prescribe criteria to be followed by the IHS or BIA in allocating resources among their various programs for the "benefit, care and assistance" of Indians. Compare *United States* v. *Alaska*, No. 118 Orig. (Apr. 21, 1992), slip op. 6. The Snyder Act therefore provides no judicially manageable standards for judging whether the IHS's decision to transfer staff from a regional to a nationwide program is proper. Cf. *Scholder* v. *United States*, 428 F.2d at 1128 (rejecting contention that Snyder Act "present[s] federal courts with the unenviable task of reviewing individual [BIA] expenditures and speculating in each instance about [who are the] potential beneficiaries"). Even the court of appeals apparently did not view the Snyder Act as sufficient in itself to furnish "law to apply," since it acknowledged that "specific manageable standards for reviewing the funding termination are difficult to find in the Snyder Act." App., *infra*, 10a. Instead, the court looked to the Act only to inform the "overriding duty of fairness" that it believed was required by the "special relationship" between the United States and Indians. App., *infra*, 13a, 14a, 15a n.7. As already explained, the court plainly erred in fashioning that judicially enforceable duty, which has no basis in any Treaty or Act of Congress.[7]

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[7] Put another way, Congress has chosen to fulfill *its* view of the special relationship between the United States and

c. That there should be no law to apply to the agency decision at issue in this case is hardly surprising. Courts, including the Tenth Circuit, have observed that agency funding decisions are "notoriously unsuitable for judicial review, for they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the widest dissemination of an agency's limited budget." *Community Action of Laramie County, Inc.* v. *Bowen*, 866 F.2d 347, 354 (10th Cir. 1989) (citing *Alan Guttmacher Inst.* v. *McPherson*, 597 F. Supp. 1530, 1536-1537 (S.D.N.Y. 1984)); compare *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985) (agency decisions not to enforce law committed to agency discretion because they involve "complicated balancing of a number of factors which are peculiarly within its expertise," including the allocation of scarce "agency resources" and "the proper ordering of its priorities"). That is particularly true where, as here, the agency's decision involves allocation of lump-sum appropriations, because such appropriations have long been understood to "leave[] it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit." *International Union, UAW* v. *Donovan*, 746 F.2d at 861; compare *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (agency action unreviewable where matter has traditionally been regarded as committed to agency discretion); *Chaney*, 470 U.S. at 832 (same). Finally, to permit judicial review in cases such as this would impermissibly involve the courts in agency administration, which would have "disruptive practical consequences." *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979).

Indians in this setting by enacting the Snyder Act (and annual appropriations authorized by that Act) and vesting broad discretion and flexibility in the IHS and the BIA. Because Congress has implemented and given content to the special relationship in this manner, that relationship furnishes no independent basis for a court to review and constrict the discretion of the agencies in which Congress chose to vest responsibility.

For the foregoing reasons, among others, the courts have long declined to review agency decisions involving the termination or reallocation of agency services or resources. See *National Federation of Federal Employees* v. *United States*, 905 F.2d 400, 405-406 (D.C. Cir. 1990) (decision to close military bases is committed to agency discretion by law);[8] *Sergeant* v. *Fudge*, 238 F.2d 916, 917 (6th Cir. 1956) (no review of a decision to discontinue a post office), cert. denied, 353 U.S. 937 (1957); *Los Angeles Customs & Freight Brokers Ass'n* v. *Johnson*, 277 F. Supp. 525, 532-534 (C.D. Cal. 1967) (no review of a decision to shift the location of a customs office). The IHS action respondents challenge here is, in principle, no different from the administrative decisions challenged in those cases. In the absence of meaningful standards by which to review the IHS's allocation of funds and resources, that action is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and therefore is not subject to judicial review.

2. a. The district court further held that the decision to terminate the ICP constituted legislative rulemaking subject to the notice-and-comment requirements of the APA. App., *infra*, 35a-44a. While the court of appeals did not engage in a detailed discus-

[8] Cf. *Specter* v. *Garrett*, No. 91-1932 (3d Cir. Apr. 17, 1992), slip op. 23-24 (substance of President's decision to close military base not subject to judicial review).

sion of that ruling, it expressly "f[ou]nd no error in [the district court's] analysis of the rule making issue." App., *infra*, 16a. In our view, the court of appeals was fundamentally mistaken on that point.

The APA requires agencies to follow notice-and-comment procedures when promulgating legislative rules. 5 U.S.C. 553. The term "rule" is defined to mean:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

5 U.S.C. 551(4). The attribute of prospectivity is of central importance in determining whether agency action constitutes rulemaking: "[A] rule is a statement that has legal consequences only for the future," and "deals with what the law will be." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 217, 221 (1988) (Scalia, J., concurring). Thus, a rule "must be of *future effect*, implementing or prescribing *future law*," and "is agency action which regulates the *future conduct* of either groups of persons or a single person." *Id.* at 218-219 (quoting *Attorney General's Manual on the Administrative Procedure Act* at 13-14 (1947)) (emphasis added).[9]

[9] The Court has previously accorded deference to the Attorney General's Manual "because of the role played by the Department of Justice in drafting the legislation." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

The IHS decision to reallocate resources from the ICP to a nationwide effort on behalf of handicapped Indian children was clearly not a "rule" under this definition. The decision did not prescribe law for the future, or purport to impose binding requirements or standards governing future action by either the IHS or private parties. To be sure, the IHS's action had a "future effect" in the sense that it had consequences that would be felt in the future (when particular services would not be available out of the Albuquerque office); but that cannot suffice to render the IHS's decision a "rule," because the same can be said of *any* agency decision not to follow a certain course of conduct in the future.[10] The crucial distinction is that although the agency's resource allocation decision in such cases may have ramifications for the future, it is not accompanied by an "agency *statement*" that is independently of "future effect" in the sense that it *prescribes law or policy* for the future; the agency's reallocation decision is self-contained, and does not purport to bind or guide other decisions that may be made by the agency (or private parties) down the road. In this case, for example, nothing about the IHS's August 1985 decision to terminate the ICP and reallocate the resources elsewhere would have prevented IHS from changing its mind and reinstating the program in whole or in part at some later date, and the IHS would not have been required to modify or rescind the August 1985 decision to do so. Thus,

[10] Indeed, an agency adjudication can have consequences for the future (*e.g.*, if it results in a cease-and-desist order), but those consequences obviously do not render the adjudicatory decision a rule.

the courts below clearly erred in holding that the termination decision constituted a "rule."

This conclusion is underscored by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). *Overton Park* involved a challenge to an agency decision to expend federal funds to build a highway through a park. The Court held that the agency decision to allow the expenditure of federal funds "was plainly not an exercise of a rulemaking function." 401 U.S. at 414. It follows that neither the IHS's original decision to fund the ICP nor its decision to terminate that program constituted rulemaking under the APA. Thus, under *Overton Park*, agency decisions concerning the discretionary allocation of funds for the provision of services are simply not subject to the procedural requirements that govern promulgation of legislative rules. See also *United States* v. *Cooper*, 699 F. Supp. 69, 74 (W.D. Pa. 1988) (list of placement sites for physicians who have received National Health Service Corps Scholarships is not a rule).

b. The court of appeals compounded its error on this issue by declining to limit itself to the question whether termination of the ICP constituted legislative rulemaking for purposes of the APA. Instead, the court went further, and announced the broad proposition that "notice and comment procedures should be provided *any time* the government 'cuts back congressionally created and funded programs for Indians' even when the Indians have no entitlement to the benefits." App., *infra*, 15a (emphasis added). That proposition represents a radical and unwarranted expansion of rulemaking requirements beyond those imposed by the APA, and is directly contrary to the pronouncements of this Court.

In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), this Court squarely held that the federal courts have no authority to impose procedural requirements on federal agencies based on considerations of public policy. Under *Vermont Yankee*, a reviewing court is not free to force upon an agency the court's "own notion of which procedures are 'best' or most likely to further some vague, undefined public good." 435 U.S. at 549. Rather, the courts are limited to determining whether the agency has complied with the procedures mandated by the relevant statutes. *Ibid.*

Nothing in the APA provides the slightest support for the court's holding that all agency actions that may adversely affect Indians must automatically be subjected to notice-and-comment procedures. Nor does any other statute or regulation require that agencies providing services to Indians undergo formal notice-and-comment rulemaking before modifying or terminating whatever discretionary programs or services they offer. In particular, neither the Snyder Act nor the IHCIA—the principal statutes relied on by respondents—imposes any such requirement.[11]

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[11] In general, appropriations under the Snyder Act are "gratuitous appropriations of public monies." *Scholder* v. *United States*, 428 F.2d at 1129. IHS regulations make clear that there is no entitlement to particular IHS services and that the health services provided by the agency "to any particular Indian community will depend upon the facilities and services available from sources other than [IHS] and the financial and personnel resources made available to [IHS]." 42 C.F.R. 36.11(c). This published rule describing the contours of the IHS's programs in general terms makes clear that the myriad decisions that must be made in allocating resources under the rule will not themselves take the form of rules.

Likewise, the "special relationship" between Indians and the federal government does not provide any basis for imposing such procedural requirements on agencies. As noted above, pp. 11-12, *supra*, that relationship is not an independent source of specific legal constraints on the actions of the federal government in the absence of any showing that the government's actions will adversely affect Indian property rights or entitlements. Rather, the only specific and enforceable duties owed to Indians by the federal government in this context are those that are statutorily derived. Since no statute or regulation imposes the extraordinary notice-and-comment requirement adopted by the court of appeals in this case, the court's holding was in direct violation of *Vermont Yankee*.[12]

c. The court of appeals believed that its rulemaking requirement was compelled by *Morton* v. *Ruiz*, 415 U.S. 199 (1974). However, *Ruiz*, which was decided

[12] Congress has, by statute, directed the IHS to consult with Indian tribes before making certain decisions. For example, the IHS is required by the 1988 amendments to the IHCIA to consult with the affected Indian tribe before building, renovating, or closing Indian health facilities. See Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 301, 102 Stat. 4812-4813. In addition, the BIA informs us that it has issued non-binding guidelines for consulting with Indian tribes on certain personnel management decisions. Thus, the fact that notice-and-comment rulemaking procedures need not be followed before the IHS or BIA revises or terminates discretionary programs does not necessarily mean that those agencies will act without taking into account the comments of Indians. In fact, direct consultation with the affected Tribes may often be a more effective way of receiving their input than would publication of a proposal in the *Federal Register* and inviting written submissions to an office in Washington, D.C.

before *Vermont Yankee*, did not even address the question of notice-and-comment procedures, and it provides no support for the broad principle announced by the court of appeals.

Ruiz involved a challenge to a provision of the BIA's unpublished internal manual that limited eligibility for general assistance benefits to those Indians living "on" reservations. Finding that Congress had permitted those benefits to be available to Indians living on *or near* reservations, 415 U.S. at 230, the Court held that the BIA's adoption of a narrower eligibility standard was invalid because BIA had not published that standard, in violation of its own rules requiring publication of eligibility requirements. *Id.* at 235-236.

The BIA manual provision at issue in *Ruiz* prescribed binding future standards governing an individual Indian's eligibility for whatever level of general assistance benefits the BIA furnished. That provision therefore was reasonably regarded as a "rule," because it was an "agency statement" of "future effect." In fact, it may well have constituted a legislative rule of the sort that the APA requires to be preceded by notice-and-comment rulemaking procedures. The Court did not, however, address that issue; instead, as the Court noted, the BIA's decision to ignore its own requirements for publication of such standards rendered the eligibility requirement unenforceable. *Id.* at 235-236. *Ruiz* thus does not suggest that *all* agency decisions adversely affecting Indians—especially those that are not even "rules"—must be subjected to the full panoply of procedural requirements applicable to legislative rules; to the contrary, the Court's decision clearly rested on the determination that the Manual provision was in fact an attempt

to impose a rule of personal eligibility on individual Indians without following the necessary procedures.

This case, by contrast, does not involve personal eligibility for IHS services.[13] It involves the allocation of staff and other resources within IHS and the general level and type of services that will be made available at particular locations. Nothing in *Ruiz* suggests that notice-and-comment procedures must be followed in that setting.[14]

3. The decision of the court of appeals warrants review by this Court. As a practical matter, the court's decision is likely to have significant deleterious effects on the administration of Indian programs. The IHS, for example, delivers health care to more than one million Indians and Alaska Natives nationwide. See R. Walke, *Federal Programs of Assistance to Native Americans*, S. Prt. No. 62, 102d Cong., 1st Sess. 140 (1991). Moreover, the court's reliance on legislative history of appropriations Acts to justify judicial review where no Act of Congress furnishes

[13] That subject is separately addressed by existing IHS regulations. See 42 C.F.R. 36.12.

[14] In explaining its result, the *Ruiz* Court also referred to the federal government's duty to deal fairly with the Indians. 415 U.S. at 236. The Court did so, however, only after first satisfying itself that Congress had made Indians living near reservations eligible for benefits and that the Manual provision was the type of standard for which publication was required. The Court then referred to the "trust" responsibility to Indians in explaining why it was particularly suitable to enforce that mandate, holding that "[b]efore benefits may be denied to these otherwise entitled Indians, the BIA must first promulgate eligibility requirements according to established procedures." *Ibid.* The Court did not hold that the "trust" responsibility furnished an independent source of procedural requirements.

standards for a court to apply, and its apparent approval of the district court's all-encompassing definition of rulemaking, has serious implications for the proper development of administrative law outside the context of Indian affairs.

The IHS and other agencies routinely provide Congress with considerable detail on programs and expenditures when they submit justifications for appropriations to Congress. For example, in the 1983 hearings on which the court of appeals relied (App., *infra*, 11a-12a), the IHS discussed not only the ICP, but also specific clinics and hospitals, repairs to facilities, staff housing problems, and alcoholism and urban health projects. See *Department of the Interior and Related Appropriations for 1984: Hearings Before the Subcomm. on the Dep't of the Interior of the House Comm. on Appropriations*, 98th Cong., 1st Sess. Pt. 3, at 331-418 (1983). These programs are frequently mentioned in committee reports. See *id.* at 350-358. Indeed, many, if not most, IHS programs are " 'cognized' by Congress in its appropriations process." App., *infra*, 15a n.7. The court of appeals' decision apparently requires notice-and-comment procedures for any decision to terminate or relocate such services, vastly increasing the time and expense of adjusting agency operations in response to ever-changing needs and resource availability.[15] The practical effect of the court's decision may well be to render such agencies incapable of modifying services in response to budget cutbacks, because the fiscal year

[15] The burdens and delays imposed by the decision below should not be underestimated. The Department of Health and Human Services, for example, informs us that it takes between one and two years from the time a decision to promulgate a legislative rule is made until the final rule takes effect.

in which the cutbacks occur may well have expired before a final rule implementing those cutbacks can take effect. Review by this Court is therefore necessary to correct the fundamentally erroneous principles of administrative procedure and judicial review announced by the Tenth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-2235

GROVER VIGIL, CHARLENE VIGIL, as General Guardians and Next Friends for ASHLEY VIGIL, a minor person, KEE SANDOVAL, JUDY SANDOVAL, as General Guardians and Next Friends for KRISTOFFERSON SANDOVAL, a minor person, ANGELA ALLEN, as General Guardian and Next Friend for ANGELO ALLEN, a minor person, individually and on behalf of all other persons similarly situated, PLAINTIFFS-APPELLEES,

vs.

EVERETT R. RHOADES, M.D., Director of the Indian Health Service, his agents, employees, and successors, OTIS R. BOWEN, Secretary of the Department of Health and Human Services, his agents, employees, and successors, THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DONALD O. HODEL, Secretary of the Department of the Interior, his agents, employees, and successors, ROSS SWIMMER, Assistant Secretary of the Interior-Indian Affairs, BUREAU OF INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS.

Appeals from the United States District Court
for the District of New Mexico

(D.C. No. 86-1182-JB)
746 F. Supp. 1471

[Filed Jan. 15, 1992]

Before SEYMOUR, BARRETT and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

The government appeals from the district court's grant of summary judgment in favor of the Plaintiffs-appellees, a certified class of handicapped Indian children who have received or will be eligible to receive clinical services from the Indian Health Service (IHS) pursuant to the Indian Children's Project (Project). The IHS is an agency within the Department of Health and Human Services. It began the Project in the late 1970's in conjunction with the Bureau of Indian Affairs (BIA), a Department of the Interior agency, in order to provide clinical services to handicapped Indian children residing in the southwestern United States. In 1985, the IHS decided that Project staff would be better utilized as consultants to other IHS programs nationwide. IHS subsequently terminated the Project clinical services and reassigned its staff without affording notice and comment procedures.

The Plaintiffs brought this suit seeking declaratory and injunctive relief. They claimed that the ter-

mination of services violated the federal trust responsibility to Indians, the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, the Snyder Act, c. 115, 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. § 13), the Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 25 U.S.C. §§ 1601-83), various agency rules and regulations, and their Fifth Amendment due process rights. Plaintiffs moved for partial summary judgment, Fed. R. Civ. P. 56(c), and the government moved for dismissal for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), or, in the alternative, summary judgment. The district court held that the termination was subject to judicial review and, as a legislative rule, was subject to the APA's notice and comment procedures as set forth at 5 U.S.C. § 553. *Vigil v. Rhoades*, 746 F. Supp. 1471 (D.N.M. 1990). Given the IHS's concession that it did not provide notice and comment, the district court employed a traditional equitable analysis and granted affirmative injunctive relief requiring the IHS to reinstate the Project. *Id.* at 1483-87.

The government argues that (1) the termination was not judicially reviewable under the APA because it was committed to agency discretion, 5 U.S.C. § 701(a)(2), or, in the alternative, (2) the termination was not subject to notice and comment procedures under the APA because it was not a legislative rule, *id.* § 553, and (3) the termination was not arbitrary and capricious or an abuse of discretion under the APA, *id.* § 706(2)(A). We find no error in the district court's analysis, *see* 746 F. Supp. 1471, and we affirm the judgment.

I. Background

The background of the Indian Children's Project is clouded in bureaucratic haze. Nevertheless, we recount it here largely from undisputed facts in the record and Congressional hearings testimony. The Project was funded pursuant to two Acts of Congress, the Snyder Act, 25 U.S.C. § 13, and the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601-83. The Snyder Act, Congress' formal legislative authorization for Indian welfare, requires the Secretary of Health, Education and Welfare to "direct, supervise, and expend [Congressional appropriations] for the benefit, care, and assistance of the Indians throughout the United States for . . . relief of distress and conservation of health." 25 U.S.C. § 13.[1] In addition, Title II of the IHCIA provides for supplemental appropriations for several broad categories of Indian health care, including "mental health." 25 U.S.C. § 1621(a)(4)(D). Under the mental health provision, Congress authorized the IHS to establish "[t]herapeutic and residential treatment centers." *Id.* These centers were to come about pursuant to "a major cooperative care agreement between the IHS and the BIA using suitable BIA facilities in convenient locations." H.R. Rep. No. 1026, 94th Cong., 2d Sess. 81 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2652, 2719.

Congress did not fund the treatment centers for disturbed children; however, the IHS allocated $292,000

[1] The Snyder Act encompasses other Indian programs and initially concerned only Bureau of Indian Affairs spending, but the Indian Health Facilities and Hospitals Act, c. 658, § 1, 68 Stat. 674 (1954) (codified as amended at 42 U.S.C. § 2001), transfers authority for Indian health care to the Secretary of Health, Education and Welfare.

and 11 positions from its fiscal year 1978 general IHCIA Title II appropriation to the IHS Headquarters mental health branch in Albuquerque, New Mexico for the planning and development of a handicapped children's project, the Indian Children's Project. The Project then began providing services to handicapped Indian children partially in an effort to assess the need for a treatment center—instead of using BIA facilities as Congress had envisioned, the IHS planned on constructing its own diagnostic and treatment center. IHS later requested a $3.5 million appropriation from Congress for the center. *Department of the Interior and Related Agencies Appropriations for 1980: Hearings before the House Subcommittee on the Department of the Interior*, 96th Cong., 1st Sess., pt. 8 at 245-252. Congress did not fund the center, but appropriated $300,000 for fiscal year 1980 to the IHS for development and expansion of the Project to a national level in Conjunction with the BIA.[2]

[2] The House Report regarding the appropriation bill states:

> In addition, the Committee has provided an increase of $300,000 for expansion of the handicapped children's program. The Funds will be used to provide diagnostic service to children with complex problems who reside nationwide and who require a sophisticated medical treatment for their disorders.

H.R. Rep. No. 374, 96th Cong., 1st Sess., 82-83 (1979).

The Senate report states:

> The Committee concurs in the House increases of . . . $300,000 to widen diagnostic, health and education services for handicapped children. The current handicapped program budgeted at $292,000 is little more than a consulting service for the Albuquerque, N. Mex., area. Under a cooperative agreement with the Bureau of Indian Affairs, which is to provide facilities, transportation and educational services, the program should expand to

BIA began participating in the Project in 1979 by allocating $350,000 of year-end funds for contract services. By 1980, the BIA and IHS had entered a memorandum of agreement which provided for a joint effort to serve handicapped Indian children through direct or contracted clinical treatment. App., Ex. 6. Apparently, the effort to persuade Congress to fund a treatment center was forgotten, and the Project staff concentrated primarily on diagnosis and treatment of handicapped Indian children in the Southwest. This effort continued on a regional basis until IHS terminated direct clinical services in August 1985. As of August 1985, the staff was following 426 handicapped children. BIA continues to follow handicapped Indian children pursuant to its educational responsibilities under the Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 774 (codified as amended at 20 U.S.C. §§ 1400 *et. seq.*). The government contends that Plaintiffs are eligible for a "comprehensive array" of services pursuant to the EAHCA; however, the record contains no documentary evidence that services comparable to the former Project services are available in the reservation communities of the 426 children followed as of August 1985.

II. Disposition

Pursuant to the APA, any person legally aggrieved by a final agency action presumptively is entitled to judicial review thereof. *See* 5 U.S.C. §§ 702, 704 (provisions regarding presumptive review and finality respectively). Nevertheless, a federal district

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one offering short-term residential care and referral services better designed to meet the health needs of Indian Children from all areas of the Nation.

S. Rep. No. 363, 96th Cong., 2d Sess. 91 (1979).

court's subject matter jurisdiction over an APA claim arises under 28 U.S.C. § 1331. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979) (citing *Califano v. Sanders*, 430 U.S. 99 (1977)). This jurisdiction, however, is not without exception. The APA provides that an agency action is reviewable "except to the extent that—(1) statutes preclude judicial review; or (2) [the] agency action is committed to agency discretion by law." 5 U.S.C. § 701. If either APA preclusion applies, federal subject matter jurisdiction under 28 U.S.C. § 1331 does not exist. *See Califano*, 430 U.S. at 105 (§ 1331 jurisdiction subject to federal "preclusion-of-review statutes"). *See also Robbins v. Reagan*, 780 F.2d 37, 57 (D.C. Cir. 1985) (Bork, J., dissenting). In its Fed. R. Civ. P. 12(b)(1) motion, the government argued that IHS's Project termination decision fell under the § 701 (a)(2) preclusion for actions "committed to agency discretion by law." We review this jurisdictional argument de novo. *See Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641 (10th Cir. 1990). We also review the summary judgment determination de novo, using the same standard as the district court. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The parties agree that no material factual disputes exist in this case; the arguments are strictly legal.

The Supreme Court has stated that the § 701 (a)(2) preclusion of judicial review for matters committed to agency discretion is "very narrow." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). It applies only "in those rare instances

where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Id.* (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). In *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), the Court elaborated on the issue in the context of the Food and Drug Administration's decision not to enforce certain federal statutes. The *Chaney* Court held that judicial review of an agency nonenforcement decision is not available unless Congress clearly indicates to the contrary. *Id.* at 838. This is so because of the "general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* at 831. Such decisions are unsuitable for review in part because Congress normally does not provide "meaningful standards for defining the limits of [enforcement] discretion." *Id.* at 834. Although the *Chaney* Court dealt with a nonenforcement decision, it set forth a principle applicable to all agency actions—"review is not to be had if the statute is drawn so that a court could have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830. Even after *Chaney*, however, the general exception to judicial review "for action 'committed to agency discretion' remains a narrow one." *Id.* at 838.

The Court's most recent pronouncement on this issue came in *Webster v. Doe*, 486 U.S. 592 (1988), a case dealing with the Central Intelligence Agency Director's decision to terminate an employee for purported security reasons. The *Webster* Court stressed the need for a careful examination of the language and structure of the statutes which provide the basis for the alleged agency illegality. *Id.* at 600. The Court also noted that agency regulations, in the absence of meaningful statutory standards, may provide a basis for review. *Id.* at 602 n.7. In that case, the

language of the National Security Act of 1947 (NSA) § 102(c), 50 U.S.C. § 403(c), provided unfettered discretion to the Director of Central Intelligence to terminate any employee, and the overall structure of the NSA revealed an overriding need for security in the CIA employment process. *Webster*, 486 U.S. at 600-01. Furthermore, the agency's own regulations allowed for maximum discretion. *See id.* at 602 n.7. Under the circumstances, the Court found no manageable standards with which to review the employment termination and therefore applied the § 701(a)(2) exception.[3]

Since *Webster* this court has had ample opportunity to apply the § 701(a)(2) exception.[4] The government, however, relies primarily on one case, *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347 (10th Cir. 1989) [hereinafter *CALC*], in support of its argument that the Project termination in this case is unreviewable. In *CALC*, we examined the language and structure of the Head Start Act

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[3] The *Webster* Court, however, held that colorable constitutional claims were reviewable in the absence of clear Congressional intent to the contrary. 486 U.S. at 603. *See also Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 353 (10th Cir. 1989) ("judicial review of colorable constitutional claims remains available unless Congress has made its intent to preclude review crystal clear") [hereinafter *CALC*]. We need not address this issue in this case because the Plaintiffs' constitutional claims are not before us given our disposition of the case.

[4] *See, e.g., Selman v. United States*, 941 F.2d 1060 (10th Cir. 1991); *American Bank, N.A. v. Clarke*, 933 F.2d 899 (10th Cir. 1991); *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634 (10th Cir. 1990); *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990); *CALC*, 866 F.2d 347; *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988).

(HSA), Pub. L. No. 97-35, Title VI, §§ 635 *et seq.*, 95 Stat. 499 *et. seq.* (1981) (codified as amended 42 U.S.C. §§ 9831-58), as well as its underlying regulations, *see, e.g.*, 45 C.F.R. §§ 1303.33(b), 1303.36(b), in search of manageable standards with which to review the termination of funding of a local Head Start grantee. The Department of Health and Human Services had terminated funding for the grantee largely because of a vexatious political dispute between the grantee and the local Head Start policy council. *See CALC*, 866 F.2d at 353-54. We found no manageable standards in the applicable statutes and regulations, and we emphasized the unsuitability for judicial review of agency funding decisions: "Funding determinations are 'notoriously unsuitable for judicial review, for they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the wisest dissemination of an agency's limited budget.'" *Id.* at 354 (quoting *Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1536-37 (S.D.N.Y. 1984), *aff'd*, 805 F.2d 1088 (2d Cir. 1986)). *See also International Union, United Autoworkers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."), *cert. denied*, 474 U.S. 825 (1985).

The government contends that the termination of the Project services in this case is similar to the grant termination in *CALC*, that is, a mere funding determination which is unsuitable for judicial review. Indeed, specific manageable standards for reviewing the funding termination are difficult to find in the Snyder Act, the EAHCA and the IHCIA, three

sources relied upon by the district court as "ample 'law to apply.'" *See* 746 F. Supp. at 1477. The Plaintiffs have not cited any statute or regulation which even refers to the Project or provides specific standards for reviewing its termination. Perhaps this is due to the complex background of the Project. As the government contends, the Project appears to have been created at the discretion of the IHS in furtherance of the Congressional intent expressed in the Snyder Act and the IHCIA provision for "[t]herapeutic and residential treatment centers" as described in the IHCIA at 25 U.S.C. § 1621(b)(4)(D).[5] *See supra* pp. 4-5. And it is difficult to see a correlation between the Project as it was upon termination in 1985 and the treatment centers envisioned by Congress. Nevertheless, the district court was correct in finding that Congress "had learned of the existence of the Program and cognized that fact in fashioning its Indian-related appropriations . . . ." *See* 746 F. Supp. at 1477.

We have examined Congressional hearings testimony and reports from 1980, the year Congress appropriated $300,000 for the Project, *see supra* note 2 and accompanying text, through 1985, the year IHS terminated the Project. Each year, IHS represented to Congress that it was funding the Project in order to provide services for handicapped Indian children. For example, for fiscal year 1984, IHS represented to a House appropriations subcommittee that:

> The *Indian Children's Program* (ICP) continues to function as a regional interagency IHS-BIA/

[5] The district court noted that the parties could not agree on the proper source of funding of this project. 746 F. Supp. at 1472 n.1. We have found it no less difficult to discern the source of funding of the project.

Office of Indian Education Programs (OIEP) project serving emotionally, educationally, physically and mentally handicapped American Indian children and youth in the southwest. For individual children, the ICP is providing diagnostic, evaluation, treatment planning and followup services. For parents, community groups, school personnel and health care personnel, the ICP is providing training in child development, prevention of handicapping conditions, and care of the handicapped child . . . . This activity responds to continued congressional interest in a national collaboration on behalf of handicapped children . . . . Financially the ICP is supported by both IHA [*sic*] and BIA/OIEP in an approximate 65-35 ratio. IHS . . . funds are expended under the mental health budget activity. Additional IHS funding appropriated by Congress in FY 1980 is expended under the hospitals and clinics budget activity.

Department of the Interior and Related Agencies Appropriations for 1984: Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 98th Cong., 1st Sess., pt. 3, 351 (1983) (narrative Mental Health Budget Justification report submitted to subcommittee). In response, the subcommittee report states:

> *Indian Children's Program* . . . the Committee is pleased to hear of the continued success of the Indian Children's Program, and expects IHS to include information in next year's budget justification regarding its participation and details of funds to be provided to this effort.

Id. The IHS made similar representations in the form of testimony and narrative submissions before

the same subcommittee for each year that the Project existed.[6]

The government contends that these snippets of Congressional hearings testimony and subcommittee reports do not constitute manageable standards for review. Yet, at a minimum, the hearings testimony and reports clearly demonstrate that Congress was informed of and intended to fund the Project, albeit through general appropriations, throughout the Project's entire existence. This is unlike *CALC*; whereas *CALC* involved a termination of the funding of one grantee among hundreds involved in the Head Start program, this case involves the summary termination of the program itself.

The Congressional intent to fund the Project, in combination with the special relationship between the Indian people and the federal government, strongly suggests a jurisdictional basis for review. In *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982), we relied on Congressional hearings testimony and reports in finding that Congress was aware of a BIA school lunch program and intended that all Indian school children, regardless of family income, be eligible for participation in the program—this, in spite of a general appropriation and lack of specific statutory man-

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[6] *See, e.g., Department of the Interior and Related Agencies Appropriations for 1985: Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives*, 98th Cong., 2d Sess., pt. 3, at 486 (narrative submission describing the continuation of Project); *Appropriations for 1983*, 97th Cong., 2d Sess., pt. 3, at 167 (same); *Appropriations for 1982*, 97th Cong., 1st Sess., pt. 9, at 70-74 (testimony of Dr. Emery A. Johnson, Director, IHS); *Appropriations for 1981*, 96th Cong., 2d Sess., pt. 3, at 632 (narrative submission describing continuation of Project). *See also supra*, note 2 (regarding appropriations for fiscal year 1980).

date for a school lunch program. BIA had transferred its lunch program to the Department of Agriculture, and, in the process, Department of Agriculture maximum family income requirements had eliminated many Indian children from eligibility. Interpreting the leading Supreme Court case in the area of Indian welfare programs, *Morton v. Ruiz*, 415 U.S. 199 (1974), we stated that "the government has assumed almost a guardian-ward relationship with the Indians by its treaties with the various tribes and its assumption of control over their property. This suggests that the withdrawal of benefits from Indians merits special consideration." *Andrus*, 667 F.2d at 936. *See generally Felix S. Cohen's Handbook of Federal Indian Law*, ch. 3, § C2c, 225-228 (1982) (discussing federal administrative trust responsibility to Indians, noting that "ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian . . . programs"). *Compare Kenai Oil & Gas, Inc. v. Dept. of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982) ("fiduciary responsibilities vested in the United States as trustee of Indian lands" provided adequate basis for judicial review).

It suffices to state that this "special consideration" provides an appropriate backdrop for judicial review of the agency action, particularly in light of Congress' recurring budgeting recognition of the Project. When the government "depriv[es] the Indians of benefits that have long been provided them, [it] must 'bend over backwards' to assure fair treatment." *Andrus*, 667 F.2d at 939. Given this overriding duty of fairness and the Snyder Act's general provision for "the relief and conservation of health," 25 U.S.C. § 13, it was appropriate for the district court to exercise jurisdiction. *See* 746 F. Supp. at 1478 (district

court correctly states that Snyder Act's general purpose provides "a palpable question: whether the action ultimately does redound to the 'benefit, care and assistance' of Indians").[7]

Moreover, the district court was correct in holding that APA notice and comment proceedings were necessary in this case. *See* 746 F. Supp. at 1479-83. The case is indistinguishable from *Andrus*, in which we held that *Ruiz*, 415 U.S. 199, stands for the proposition that notice and comment procedures should be provided any time the government "cuts back congressionally created and funded programs for Indians" even when the Indians have no entitlement to the benefits. *Andrus*, 667 F.2d at 936. The government attempts to distinguish *Andrus*, contending that it dealt only with an eligibility for benefits requirement, a "classic rule," whereas this case involves a simple reallocation of resources. Government's brief at 35. This argument, however, was answered very clearly in *Andrus*:

> *Ruiz* specifically focused on the BIA's duty to be fair in informing the Indians of changes in eligibility requirements for general assistance benefits, but the case may be read more broadly

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[7] In *Sierra Club v. Yeuter*, 911 F.2d 1405, we held that one of the general purposes of the Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-36), "to preserve [the] wilderness character" of subject lands, *id.* § 1133(b), did not provide us with a manageable standard of review. 911 F.2d at 1415-16. The government contends that the general purpose of the Snyder Act likewise does not provide a manageable standard. *Sierra Club v. Yeutter*, however, is readily distinguishable from this case; it did not involve the federal government's general trust duty to Indians, and it did not involve a specific project "cognized" by Congress in its appropriations process.

> to require the BIA to follow rulemaking procedures whenever it cuts back congressionally created and funded programs for Indians.

667 F.2d at 936. As we have already decided, the Project was Congressionally created and funded, and there is no question that benefits were "cut back;" the entire program was eliminated. Therefore, rulemaking procedures should have been followed.[8]

Exercising de novo review over the district court's summary judgment determination, we find no error in its analysis of the rule making issue. *See* 746 F. Supp. at 1479-83. The Plaintiffs were legally entitled to relief, and therefore, summary judgment was appropriate. Regarding the form of relief, reinstatement of the Project, *see id.* at 1483-87 (supplemental opinion), we express no opinion because the government has not raised the issue.

AFFIRMED.

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[8] The government also contends that *Andrus* is distinguishable because it dealt only with an exception to the rule making requirements, not with the issue of whether the challenged agency action was a rule. The government is correct in defining the issue of *Andrus*; the case dealt with the "grants, benefits, or contracts" exception, 5 U.S.C. § 553(a)(2), to APA rulemaking provisions. 667 F.2d at 935. However, the distinction is unavailing, for implicit in the exceptions issue is the existence of a rule.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 86-1182-JB

GROVER VIGIL and CHARLENE VIGIL as General Guardians and Next Friends for ASHLEY VIGIL, a minor person,

-and-

KEE SANDOVAL and JUDY SANDOVAL as General Guardians and Next Friends for KRISTOFFERSON SANDOVAL, a minor person,

-and-

ANGELA C. ALLEN, as General Guardian and Next Friend for ANGELO ALLEN, a minor person, individually and on behalf of all other persons similarly situated, PLAINTIFFS,

v.

EVERETT R. RHOADES, M.D., Director of the Indian Health Service, his agents, employees, and successors; OTIS R. BOWEN, Secretary of the Department of Health and Human Services, his agents, employees, and successors; THE DEPARTMENT OF HEALTH AND HUMAN SERVICES; DONALD O. HODEL, Secretary of the Department of the Interior, his agents, employees, and successors; ROSS SWIMMER, Assistant Secretary of the Interior-Indian Affairs, Bureau of Indian Affairs, United States Department of the Interior, his agents, employees, and successors; THE DEPARTMENT OF THE INTERIOR; and the UNITED STATES OF AMERICA, DEFENDANTS.

MEMORANDUM OPINION AND ORDER

[Filed Jul. 6, 1990]

THIS MATTER is before the Court on the Motion for Partial Summary Judgment filed December 30, 1987 by Plaintiffs, the Motion to Dismiss and in the Alternative for Summary Judgment Based on Lack of Jurisdiction filed December 30, 1987 by "federal" defendants and joined and supplemented February 3, 1988 by "interior" defendants, all responses thereto, and all replies to the responses. Having reviewed the pleadings, the evidence of record and the relevant law, the Court finds that Defendants' motions are not well taken and will be denied, and that Plaintiffs' motion is well taken and will be granted with relief limited to that set forth herein.

Over the extended history of this litigation, virtually no operative fact has escaped dispute by the parties. The Court's careful scrutiny of the record places at least this much beyond controversy: Using funds appropriated pursuant to the Snyder Act,[1] 25 U.S.C. § 13, the Bureau of Indian Affairs ["BIA"] and the Indian Health Service ["IHS"] jointly established and, for a time, operated, the Indian Children's Program ["Program"]. This was an undertaking that directly provided a variety of health care support services to certain handicapped Indian children.

[1] Denying that the Snyder Act was the sole funding authority, Plaintiff adverts as well to the Indian Health Care Improvement Act, 25 U.S.C. § 450-450(n) (1982, Supp. II 1984, and Supp. III 1985) ["IHCIA"] (also referenced by parties as Pub. L. 94-437), and to the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400 *et seq.* (1982, Supp. I 1983, Supp. II 1984, Supp. III 1985) ["EAHCA"] (also referenced by parties as Pub. L. 94-142).

The array of services included identification and diagnosis of the children and their handicaps, development and monitoring of treatment plans, "consultative visits" in children's home communities, training, and some clinical services such as physical therapy. Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 1-3; Memorandum in Support of Defendants' Motion to Dismiss at 15-18. The Program was in place at least in preliminary form as early as 1979. *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss, Exhibit "G" [Hearings Before the House Subcommittee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1980, 96th Cong., 1st Sess., pt. 8, at 245-52]. The evolving contours and exact details of the Program and its manner of operation are intricate and will be discussed only as relevant to the Court's individual rulings *infra*.

Over a period of several months beginning in July 1985, the Program was terminated,[2] apparently at the immediate instance of IHS officials Kreuzberg and Vanderwagen. The termination was effected in a manner that Defendants concede did not comport with the requirements of the Administrative Proce-

[2] *See* Memorandum in Support of Defendants' Motion to Dismiss at 23-24, Exhibit "S" [July 1985 Memorandum from Pierce and Makowski], Exhibit "T" [August 1985 Memorandum from Pierce and Makowski]. While not denying that the Program was "terminated" as such, Defendants characterize the atcion at issue as "a decision made by the Indian Health Service (IHS) to discontinue consultative patient services provided by the IHS component of what was the Indian Children's Program, a joint pilot project in the southwest co-administered by the IHS and the Bureau of Indian Affairs (BIA)." Memorandum in Support of Defendants' Motion to Dismiss at 1.

dure Act ["APA"], *see* Memorandum in Support of Defendants' Motion to Dismiss at 46, the applicability of which is one of the questions now before the Court. As of the termination of direct Program services in 1985, it was "currently following" some 426 children. Deposition of Sanchez at 44-46. According to Defendants, the decision to terminate the Program involved "redirecting staff efforts into a national data gathering and technical assistance role for the benefit of all IHS Areas and Service Units throughout the country." Memorandum in Support of Defendants' Motion to Dismiss at 2.

Plaintiffs thereafter commenced this action for declaratory and injunctive relief against the United States; the Department of the Interior, of which the Bureau of Indian Affairs is an agent; the Department of Health and Human Services, of which the Indian Health Service is an agent; and various officials of these entities. In particular, Plaintiffs seek a judicial declaration that the termination violated the federal trust responsibility to Indians, the Administrative Procedure Act, the Fifth Amendment, the Snyder Act, the Indian Health Care Improvement Act, and various other "rules and regulations;" and that the termination was arbitrary and capricious, an abuse of agency discretion, and contrary to law. Plaintiffs accordingly request an injunction compelling Defendants to provide essential health care support services to Plaintiffs and compelling Defendants to withdraw their termination of the Program. Plaintiffs also request "mandamus relief" compelling Defendants to: 1) undertake public notice and comment procedures before again terminating the Program; 2) implement a system to ensure optimum health for handicapped Indian children at service units in the Southwest; and 3) "develop and

implement a national level policy with respect to their obligation to provide health and medical services to handicapped Indian children." Plaintiffs are a stipulated class consisting of:

> all handicapped Indian children who in the past received, or who presently are, have been, or will be eligible to receive health services from the Indian Health Service in the Albuquerque area, Navajo area, and Hopi reservation portion of the Phoenix area, including health services formerly available through the Indian Children's Program.

Vigil v. Rhoades, Civil No. 86-1182-JB, Order [certifying class pursuant to Fed. R. Civ. P. 23(b)] (D.N.M. June 22, 1987).

Plaintiffs develop two theories in their bid to have the Court set aside the termination of the Program under the judicial review powers afforded by the Administrative Procedure Act ["APA"]. They are, broadly: 1) that the termination violated the federal government's trust duty to Indians as expressed generally and in a number of statutory schemes particularly the Snyder Act, the Education for All Handicapped Children Act, and the Indian Health Care Improvement Act; and, 2) that the manner of the termination violated the "notice and comment" provisions of the APA. Plaintiffs also claim that the termination violated their Fifth Amendment right to due process.[3] Plaintiffs move for summary judgment

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[3] In addition, The Complaint and Plaintiffs' moving papers disclose an ill-developed attempt to proceed *directly* under the doctrine of federal trust responsibility to Indians. Given its rulings, *infra*, the Court need not address the viability of such an approach.

as to certain of their requests for relief and on all but their constitutional claims.[4] Defendants move for dismissal, arguing that Plaintiffs lack standing; that Plaintiffs fail to state a claim for relief because they lack specific substantive entitlement to Program services and hence assert no deprivation of any legally protected right; and that Plaintiffs are not entitled to the judicial review they seek. Alternatively, Defendants seek summary judgment upholding the termination as having a rational basis and as not being contrary to law, 5 U.S.C. § 706(2)(a), and determining that Plaintiffs' constitutional claims must fail for lack of any legitimate claim of entitlement to the services or procedure Plaintiffs seek.

The parties have framed substantial questions respecting Plaintiffs' standing to sue and the availability of judicial review of the administrative action terminating the Program. The Court resolves the standing issues in Part I of this Opinion and the reviewability issues in Part II. In Part III, the Court proceeds to the determination whether the termination of the Program violated the Administrative Procedure Act.

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[4] Specifically, Plaintiffs "move the Court for a partial summary judgment declaring . . . that Defendants owe a special trust duty to Plaintiffs; . . . that Defendants have violated their special trust obligations to Plaintiffs by terminating the ICP [and by doing so] without providing Plaintiffs with notice and an opportunity to be heard; [and] that Defendants have violated the publication and rule-making requirements of the Administrative Procedure Act, 5 U.S.C. §§ 552, 553 (1982, Supp. III 1985)." Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 4.

I.

Of threshold significance are the Interior Defendants' tardily advanced arguments that the Plaintiff class is without standing to sue them. The arguments of these Defendants implicitly fuse the standing inquiry with the assessment of legal sufficiency of a claim under Federal Rule of Civil Procedure 12(b)(6). They must therefore be assessed with respect to both standards.

In general, "question[s] of standing in federal courts [are] to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'" *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970). In assessing questions of standing to bring suit challenging administrative action, the applicable analysis is twofold. The first inquiry is whether Plaintiffs have alleged that the challenged action has caused them "injury in fact, economic or otherwise." *Id.* at 152. Then, the Court must determine whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

In contrast, a motion to dismiss under Rule 12(b)(6) focuses on the legal cognizability of a claim of injury. When considering a motion to dismiss, the material allegations of the Complaint must be accepted as true. *Franklin v. Meredith*, 386 F.2d 958, 959 (10th Cir. 1967). The complaint is not to be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); (emphasis added). The Court shall construe the pleadings liber-

ally, and if there is any possibility of relief the case should not be dismissed. *Gas-a-Car, Inc. v. American Petrofina, Inc.* 484 F.2d 1102, 1107 (10th Cir. 1973).

One of Interior Defendants' contentions is, in essence, that they never undertook to provide services to the entire Plaintiff class and hence did not injure it "in fact" when the Program was terminated. The Interior Defendants contend alternatively that they were under no legal duty to provide services to the entire Plaintiff class and hence inflicted no legally actionable harm when the Program was terminated. In support, these Defendants note that the only eligible beneficiaries of BIA health support services would be those handicapped Indian children who "attend BIA enrolled schools." *See* 25 C.F.R. 45.1. Thus, Interior Defendants contend, because there are members of the stipulated class who do not "attend BIA enrolled schools," *see* Interior Defendants' Supplemental Memorandum in Support of Defendants' Motion to Dismiss at 7, Plaintiffs' classwide claim for services against the BIA is without legal basis. Moreover, they reason, because the BIA alone could not have *lawfully* served the entire Plaintiff class, BIA sponsorship of the Program does not justify the inference that the BIA did undertake to serve the entire class. Interior Defendants further contend that those class members who do attend BIA schools now receive all the health care and support services to which they are entitled through another BIA program called ISET funded pursuant to Pub. 94-142 [5] or, for preschool Indian children ages 3-5 on reservations, through yet another BIA program. According to Interior Defendants, those who instead attend public schools receive all the services they are due from

[5] *See supra* note 1.

the public systems in which they are enrolled, also pursuant to Pub. L. 94-142. Interior Defendants thereupon conclude that no member of Plaintiff class has suffered or complains of any actionable injury at their hands.

This threshold attack on Plaintiffs' claims is grounded on a misconception of what the term "joint" means in the context of the participation of the BIA and IHS in the terminated venture. As Interior Defendants' position would have it, notwithstanding that both entities are conceded to have simultaneously sponsored the Program, each was implicitly tendering itself as "providing for" only that subset of the serviced children fitting within the literal meaning of that entity's governing statutes and regulations. Thus, the inchoate argument proceeds, because the reach of the specific statutory and regulatory provisions governing either of the two agencies alone is not so inclusive as to encompass the entirety of Plaintiff class, neither agency can properly be subject to any one of Plaintiffs' *classwide* claim against it.

This result flows from a view of the controversy that is artificial and logically awkward, and more importantly, insufficiently substantiated. Indeed, Plaintiffs' allegations and the essentially uncontested evidence in the record are to the effect that the participation of the two agencies was truly joint and was never represented otherwise—was, as a practical matter, administratively unitary, predicated on a relationship in which each agency was acting as agent for the other, and providing services in a combination and manner that neither agency alone could have offered.[6]

[6] *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss at 14, Exhibit "K" [1980 Report on Project Activity], Exhibit "L" [1980 Memorandum Agreement]; *see*

Regardless of what Defendants claim to be the scope of their *statutory* mandate, they do not deny that the Program was a jointly sponsored enterprise that in fact delivered services to Plaintiff class members not actually enrolled in BIA schools, *see, e.g.*, Memorandum in Support of Defendants' Motion for Summary Judgment at 16, and that the Program has now been terminated, *see* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 5 at 38; *see also* Memorandum in Support of Defendants' Motion to Dismiss at 3 ("The ICP pilot project no longer exists.") *Cf. Morton v. Ruiz*, 415 U.S. 199, 212 (1974) (relying on BIA's past practice as potential constraint on its future action, notwithstanding apparently permissive mandate of Snyder Act). In all, the Court finds unavailing Defendants' sponsorship-based attacks on Plaintiffs' standing and on the legal sufficiency of their claims.

Defendants' attack alternatively seeks to demonstrate failure of the "injury in fact" component of standing by alleging that Plaintiffs continue to receive health support services, albeit through different programs. Again, however, the only reasonable inference

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also Memorandum in Support of Defendants' Motion to Dismiss at 16 ("The ICP service population included not only BIA school children for whom BIA had Pub. L. 94-142 responsibilities, but also any Indian child from birth to age 21 eligible for IHS services and suspected of having a handicapping condition"); Memorandum in Support of Defendants' Motion to Dismiss at 7-9, Exhibit "B" [January 1978 Johnson Letter], Exhibit "C" [November 1977 Johnson Letter]. In characterizing the Program as a "joint pilot study project," Memorandum in Support of Defendants' Motion to Dismiss at 15, Defendants further undercut their adherence to the view that the Program had a "BIA component" somehow functionally isolable from the "IHS component."

from the record evidence supporting Plaintiffs' essentially unrebutted allegations is that since termination of the Program, class members have not been offered or have not been able to avail themselves of an array of assertedly essential health care services as extensive as that which the Program had provided. *See, e.g.*, Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 5, 8, 11, Exhibit 2 [Affidavit of Julia Sells, P.T.]; Attachment 1 to Declaration of Margaret A. Wilson, R.P.T., at 2.

As applied to the case at bar, the final phase of the standing analysis stirs no real controversy. Plaintiffs' claimed injury is "arguably within the zone of interests" sought to be protected by the body of law Plaintiffs invoke. *Association of Data Processing Service Organizations*, 397 U.S. at 153. Plaintiffs assert adverse effects upon their physical health as the result of Defendants' actions, and they do so with reference to an imposing body of law encompassing the Snyder Act, the statutory foundation for the Indian Health Service, and cases establishing the government's special duty of diligence as trustee in implementing these and other more particularized laws respecting the welfare of Indians. Plaintiffs, as Indians, are precisely the intended beneficiaries of this body of law.

Defendants inappropriately insist that Plaintiffs invoke an overt and textually precise statutory basis for each of their specific claimed entitlements to services, *see, e.g.*, Interior Defendants' Reply to Plaintiffs' Response at 3. In so doing, they essentially import *legal* sufficiency arguments into the assessment of standing, breeding confusion. Even more fundamentally, they commit themselves to a narrow, grudging view of the federal trust duty that departs significantly from the notion of that duty as evolved in the courts. In par-

ticular, such cases as *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982) make clear that an agency as trustee cannot summarily discontinue support services it has undertaken to provide to Indians and thereafter assert as justification that these services were, in a legal sense, gratuitous.

Furthermore, the Court finds that dismissal as to the BIA would be improvident. In retaining the BIA as party, the Court ensures that any decree that may be ultimately entered "is not thwarted by the omission of a[n] . . . agency that might by inaction hamper the carrying out of its provisions."[7] *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985). In all, the Court finds no deficiency in Plaintiffs' showing of their standing to challenge the administrative action here at issue. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

By parity of reasoning Defendants' arguments are equally ineffectual at showing that Plaintiffs fail to state a claim for relief. As in Defendants' argument as to standing, the object is apparently to establish that Defendants owe Plaintiffs no legal duty of the sort Plaintiffs are seeking to enforce. As already indicated, Plaintiffs assert that they suffered harm resulting from a reviewable agency rulemaking action—from the substance of that action and the manner in which it was taken. The Court finds no legally essential element missing in Plaintiffs' claim seeking judicial review of Defendant agencies' actions as having violated their statutory duties to Plaintiffs, as having been taken in violation of APA procedural requirements, and as having deprived Plaintiffs of their due process rights protected by the Fifth Amendment.

[7] Indeed, the legislative history of the IHCIA clearly demonstrates that Congress had *contemplated* "a major cooperative care agreement between the IHS and the BIA." H.R. Rep. No. 1026, 94th Cong., 2d Sess., Pt. 1 at 80-81, *reprinted in* 1976 U.S. Code Cong. and Admin. News 2718-19; *see also id.* at 94-95. As discussed *infra*, however, the Court today need not decide whether Congress, by this or any other expression, ultimately "ratified" the ICP as actually implemented.

II.

Equally untenable is Defendants' contention, upon which they seek dismissal, that judicial review of the action terminating the Program is not available to Plaintiffs. Plaintiffs are entitled to judicial review of the termination unless that action is within the "very narrow exception" for actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *see also Califano v. Sanders*, 430 U.S. 99 (1977). Except under certain circumstances not present here, *see, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (where issue is agency's refusal to take enforcement action, "the presumption is that judicial review is not available"), there is a presumption *in favor of* judicial review, and the exception for "agency discretion" is to be construed narrowly. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The Supreme Court has recently acknowledged that the presumption of reviewability has deep roots in some of that Court's earliest pronouncements on the role of the judiciary. *Bowen*, 476 U.S. at 670 (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803) ("[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.")).

Accordingly, the burden of proving nonreviewability falls heavily upon the party asserting it. *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir. 1988). The narrow exception in § 701(a)(2) precludes judicial review only when the law delineating the agency's authority is so vague or generalized that, as a practical matter, there is "no law to apply" by the reviewing Court in assessing the propriety of the agency's specific action. *See Citizens to Preserve Overton Park*, 401 U.S. at 410.

The Court concludes that the exception for actions "within agency discretion" does not apply here. Plaintiffs are correct that there is ample "law to apply" to actions of these agencies, including the Snyder Act, the EAHCA, the IHCIA, cases setting the contours of the federal government's trust duty to Indians, and significantly, evidence suggesting that Congress had learned of the existence of the Program and cognized that fact in fashioning its Indian-related appropriations in succeeding fiscal years.[8] *See Andrus*, 667 F.2d at 934-35. While the statutes are general, they are nonetheless fully explicit enough to enable a reviewing court to determine whether the agencies they bind are "ignor[ing] clear jurisdictional, regulatory,

[8] *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss, Exhibit "G" [Hearings Before the House Subcommittee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1980, 96th Cong., 1st Sess., Pt. 8 at 245-52] (Members responding favorably during briefing on ICP, reported as already being partly implemented). Further, as Defendants concede, "Congress did add $300,000 to the IHS appropriation for fiscal year 1980 to expand the ICP into a nationwide effort under a cooperative agreement with the BIA." Memorandum in Support of Defendants' Motion to Dismiss at 12 (discussing H.R. Rep. No. 374, 96th Cong., 1st Sess., at 82-83).

statutory, or constitutional commands." *Heckler v. Chaney*, 470 U.S. at 839 (Brennan, J., concurring).

For example, even the broadest of these statutes, the Snyder Act, imports some intelligible standard against which to measure agency conduct. That Act provides that "the Bureau of Indian Affairs . . . shall direct, supervise, and expend such moneys as Congress may . . . appropriate, for the benefit, care, and assistance of the Indians . . . for relief of distress and conservation of health." 25 U.S.C. § 13. These statutory parameters suffice to ensure that the Court, asked to review a given agency action, is presented with a palpable question: whether the action ultimately does redound to the "benefit, care and assistance" of Indians. In particular, the reviewing Court would be called upon to consider whether the action ultimately does work the "relief of distress and conservation of health" or whether, on the other hand, it defeats congressional purposes or flouts the legislative mandate. *See Robbins v. Reagan*, 780 F.2d 37, 45-46 (D.C. Cir. 1985). A statutory command of this breadth confers broad discretion upon the agency to apply its peculiar expertise in determining *how* to achieve its mandated objective and in optimally allocating scarce resources to this end, but the breadth of the command does not imply discretion to act in a manner that ignores or disserves the objective. *Id.; see Heckler*, 470 U.S. at 839 (Brennan, J., concurring); *see also Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 620-23 (D.C. Cir. 1987), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987) (suggesting also that a finding that the agency action was not "committed to agency discretion"—and is therefore reviewable on the merits—is not prerequisite to reviewability for "lawlessness"). Indeed, the narrow-

ness of the "no law to apply" exception is such that actions taken pursuant to some remarkably broad statutory mandates have been pronounced "reviewable." *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) ("A court can measure whether the improvement of [a local road] will 'impair the suitability of [Wilderness Study Areas] for preservation as wilderness' or will cause 'unnecessary or undue degradation.' "); *Moapa Band of Paiute Indians v. United States Department of Interior*, 747 F.2d 563 (9th Cir. 1984).

Moreover, Defendants' narrow view of what may be considered "law to apply" [9] is not the prevailing one. "Law to apply" is a protean concept and, at least with respect to the threshold determination of reviewability, has been acknowledged to encompass far more than simply the organic act creating the agency.[10]

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[9] Although, in arguing the question of reviewability, Defendants insist that only the relatively generalized Snyder Act might constitute "law to apply," in a different context they implicitly concede otherwise: "The IHS action has a rational basis and does not violate *the Snyder Act or IHCIA, the Federal trust responsibility to Indians, the Administrative Procedure Act, or plaintiffs' constitutional rights to due process.*" Memorandum in Support of Defendants' Motion to Dismiss or for Summary Judgment at 31 (emphasis added).

[10] *See, e.g., Morton v. Ruiz*, 415 U.S. 199 (1974) (adopting as norms, for purposes of review on the merits, agency's past practice and its representations to Congress); *State of Iowa v. Block*, 771 F.2d 347, 348-51 (8th Cir. 1985), *cert. den.*, 478 U.S. 1012 (1986) ("law to apply" deemed to include legislative history, a GAO report, and case law concerning judicial review of administrative action); *Cardoza v. Commodity Futures Trading Commission*, 768 F.2d 1542 (7th Cir. 1985) ("law to apply" includes the agency's own regulations and past practice; also accorded weight is any *tradition* of reviewability of a given type of administrative action); *Vigil v. Andrus*, 667 F.2d 931, 932 (10th Cir. 1982) (APA *procedural* requirements had to be met because of "the government's trust obligations to the Indians [and] the expectation of Congress in making appropriations," even where applicable statutes deemed too broad to give rise to the specific claimed entitlement); *Robbins v. Regan*, 616 F. Supp. 1259, 1276 (D.D.C. 1985), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985) ("law to apply" included statement of Secretary of Health and Human Services, from which agency's subsequent departure was reviewable).

In addition to affirmative legislative expressions, agency action has also been deemed constrained by "[t]raditional principles of rationality and fair process." *Heckler*, 470 U.S. at 853 (Marshall, J., concurring).

In all, the Court concludes that the body of law controlling and guiding these agencies as they embark on such ventures as the Indian Children's Program is not "so devoid of objective benchmarks," *Davis Enterprises v. United States Environmental Protection Agency*, 877 F.2d 1181, 1188 (3d Cir. 1989), or so lacking in "judicially manageable standards," *Heckler*, 470 U.S. at 830,[11] as to consign such actions to the

[11] The type of agency decision *Heckler* found "presumptively unreviewable" due to a lack of "judicially manageable standards" involved assessing "whether agency resources are [to be] spent on this violation or another." *Id.* at 831. Defendants, arguing that the termination was actually a reallocation decision, apparently seek to fit the action here at issue into this category. But any resemblance to *Heckler* is superficial. The *Heckler* Court addressed an agency decision to decline to undertake a specific *enforcement* action on a single occasion, and the Court's language makes clear that it conceived its holding as limited to such a scenario. Here, the complaint is of the termination of an already-active agency program that had served handicapped Indian children, a broad class of beneficiaries.

Nor is this case like *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347 (10th Cir. 1989), which declined

unreviewable discretion of the agencies. Moreover, the Court finds in the applicable law no " 'clear and convincing evidence' of a . . . legislative intent [that] the courts restrict access to judicial review." [12] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *see also Heckler*, 470 U.S. at 840-55 (Marshall, J., concurring).

Nonetheless, for reasons discussed immediately *infra*, the purposes of this ruling require only that the Court recognize the presence of this extensive and broad legal substrate as the essence of its finding of reviewability. The Court today is not faced with any ripe question of applying this body of law to the administrative action at issue for assessment of the action's substantive validity under the "arbitrary and capricious," "substantial evidence," or "unwarranted by the facts" standards prescribed by 5 U.S.C. § 706(2).[13] Thus, the Court intimates no view on what the outcome of any such assessment might be.

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to review an administrative decision to withdraw funding from a local Head Start unit over that unit's handling of a personnel matter. The administrative decision in *Laramie* was reached after notice and an extended hearing. In contrast, the case at bar concerns the summary termination of an entire service-providing support program.

[12] To conclude otherwise in a case such as this would be tantamount to "frustrat[ing] Congressional intent" that agencies be held to their legislatively-prescribed missions. *Cf. Cardoza v. Commodity Futures Trading Commission*, 768 F.2d 1542, 1549 (7th Cir. 1985).

[13] *Cf. Vinil v. Andrus*, 667 F.2d 931 (10th Cir. 1982), which apparently undertook substantive review of a BIA program termination action without treating the threshold question of the termination's reviewability *vel non*, and therefore must implicitly have assumed or concluded that the termination was reviewable. *Andrus* found the termination procedurally

III.

At the next logical threshold is the "difficult but familiar" determination, *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) whether the action terminating the Progrem was subject to the "notice and comment" requirements of the Administrative Procedure Act, 5 U.S.C. § 553, which Defendants concede were not followed.[14] This is one of the issues as to which Plaintiffs specifically seek summary judgment.

A motion for summary judgment properly may be granted only in cases where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant bears the burden of demonstrating the ab-

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invalid, and although it ultimately found no Indian entitlement to continuation of the program in its extant form, it so concluded on arriving at a factual finding of "Congress's knowledge of the . . . program *and Congress's apparent desire to shift funding of the school lunch program to another agency.*" *Id.* at 935 (emphasis added). Thus, one net effect of *Andrus* is that APA procedural requirements may be fully applicable to an action terminating or transforming a program even in the absence of a court finding of some substantive entitlement to continuation of that program.

In this case as in *Andrus*, the Court may properly decide whether the Program termination was subject to APA procedural requirements, although it is not prepared, as was the court in *Andrus*, to decide the substantive entitlement issue. In contrast with *Andrus*, nothing in the current record compels this Court to conclude that Congress desired or would have found unexceptionable the termination action of which Plaintiffs complain.

[14] *See* Memorandum in Support of Defendants' Motion to Dismiss, Exhibit "S"; *see also id.* at 25 n.17. Moreover, the parties do not dispute that the decision process did not include any participation by the BIA—one of the two sponsoring agencies.

sence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Houston v. Nat'l General Ins. Co.*, 817 F.2d 83 (10th Cir. 1987). The Court must view the record in the light most favorable to the existence of triable issues. *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977). When the nonmoving party will have the burden of proof at trial on a dispositive issue, it is required to respond by designating specific facts showing there is a genuine issue for trial. *Id.* at 324. In ruling on a motion for summary judgment, the Court does not weigh the evidence but rather asks whether, on the evidence before it, a reasonable jury could return a verdict for the nonmoving party. *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1377 (10th Cir. 1988).

To answer the question whether the "notice and comment" provisions of the APA apply, the Court must first determine whether the sponsoring agencies' termination of the Program was "rulemaking," and if so, whether it involved "substantive" or "legislative" rules as opposed to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A); *Batterton*, 648 F.2d at 701. Faced with such a gauntlet of categories, this Court is mindful that "[a]nalysis that improves upon semantic play must focus on the underlying purposes of the procedural requirements at issue." *Batterton*, 648 F.2d at 703.

The APA rulemaking requirements are animated by several related policies. The notice and comment requirement aims to ensure public participation and fairness to affected parties where agencies hold governmental authority, and to make available to the deciding agency all relevant facts and alternatives.

See id. at 703-04; *see also Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989). Indeed, an acknowledged central purpose of the APA is to ensure that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton*, 415 U.S. at 232. A procedurally inadequate determination to deny benefits to Indians in frustration of their "legitimate expectation . . . is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.* at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). Exceptions to procedural requirements are to be "reluctantly countenance." *See New Jersey v. E.P.A.*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

The Court finds as a matter of law that the termination decision amounts to a "legislative rule," *see Bellarno International Ltd. v. Food and Drug Administration*, 678 F. Supp. 410, 412 (E.D.N.Y. 1988), and is hence subject to the APA rulemaking procedures set forth in 5 U.S.C. § 553, namely, that the decision be attended by advance notice published in the Federal Register, opportunity for interested parties to be heard, and an agency statement of the action's basis and purpose. *See Lewis v. Weinberger*, 415 F. Supp. 652, 661 (D.N.M. 1976). An "agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5), is "rulemaking" subject to rulemaking procedures. A "rule" is:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or pre-

> scribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of . . . facilities, . . . services or allowances therefor . . . or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4). Thus, as one court has observed, the APA "broadly defines an agency rule to include nearly every statement an agency may make." *Batterton*, 648 F.2d at 700.

The advance publication and public comment requirements apply except to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. § 553 (b)(3)(A), and except where the agency finds, and publishes with the rule, "good cause" to avoid the requirement. 5 U.S.C. § 553(b)(3)(B). However, the requirement that the *final* rule be published thirty days before its effective date applies even to "rules of agency organization, procedure, or practice," 5 U.S.C. § 553(d)(2), again unless the agency finds, and publishes with the rule, "good cause" to avoid the requirement, 5 U.S.C. § 553(d)(3).

The action at issue here, even if characterized as a simple resource reallocation decision, cannot reasonably be considered a repeal of a mere rule of "agency organization, procedure, or practice." An internal agency practice or procedure "is primarily directed toward improving the efficient and effective operations of an agency, *not toward a determination of the rights* [*and*] *interests of affected parties.*" *Batterton*, 648 F.2d at 702 n.34 (emphasis added); *id.* at 708 (the exemption "cannot apply . . . where the agency action trenches on substantial private rights and interests."). Neither can the action be

characterized as a "general statement of policy," which is "merely an announcement of the policy which the agency *hopes to implement* in future rulemakings or adjudications." *Pacific Gas & Electric Co. v. FPC*, 406 F.2d 33, 38 (D.C. Cir. 1974). Finally, the action is clearly more than an "interpretive rule," which simply "serves an advisory function explaining the meaning given by the agency to a particular word or phrase in a statute or rule it administers." *Batterton*, 648 F.2d at 705.

Both "interpretive rules" and "general statements of policy" are marked chiefly by their *non-binding* effect and by the fact that they are "not determinative of issues of rights addressed." *See Batterton*, 648 F.2d at 702. With the record here affording no recourse to any single agency statement as the "pronouncement" which operated to terminate the Program, it is enough to conclude that the termination was of "binding effect" and preserved no "discretion" to continue to provide the array of services formerly provided by the Program.[15] *Cf.*, 678 F. Supp. at 412-15; *see also Batterton*, 648 F.2d at 702. In contrast with rules other than "legislative," it cannot reasonably be doubted that the unilateral decision to terminate the Program purported to "carry the force of law" and, adopting *arguendo* Defendants' policy-based rationale for the termina-

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[15] There is no evidence that the agencies affirmatively provided alternative resources, in mitigation of the termination; rather, the record reveals that former Program patients were "on their own" in seeking such resources as might already be available, with the defunct Program playing at most an advisory role in this process. *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss at 25 ("The purpose of the community close out meetings was to do networking, *i.e.*, match children to available services").

tion, that the action sought to "implement congressional intent" or "effectuate statutory purposes." *Batterton*, 648 F.2d at 701; *see* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 10. In that the termination operated to "grant rights, impose obligations, or *produce other significant effects on private interests*," *id.* at 701-02 (emphasis added), it is squarely within the category of "rules" to which rulemaking procedure applies. *Id.* The termination is, therefore, a "legislative rule" and not a mere "general statement of policy" for APA rulemaking purposes. Because "the agency action satisfies the APA's definition of a rule and eludes exemptions to § 553, it is procedurally defective unless promulgated with the procedures required by law." *Batterton*, 648 F.2d at 710.

Furthermore, Defendants' suggestion that the original promulgation of the Program was procedurally faulty or was without specific congressional authorization, even if true, has no effect on the applicability of the notice and comment requirement. *Cf. Andrus*, 667 F.2d at 935 (beneficiaries entitled to pretermination *procedure* even where statutory scheme found not to create any substantive entitlement to the terminated program). The Court must look beyond the agency's characterization of its own actions; the notice and comment requirement operates where agency action has "substantial impact" on the affected parties. *See, e.g., Lewis*, 415 F. Supp. at 661; *see also Andrus*, 667 F.2d at 938 (APA rulemaking procedural requirements applied where the subject action had "an adverse effect that is significant"); *cf. Federal Farm Credit Banks Funding Corporation v. Farm Credit Administration*, 731 F. Supp. 217, 223-24 (E.D. Va. 1990).

A separate publication requirement, *see generally Lewis*, 415 F. Supp. at 658-61, is imposed by 5 U.S.C. § 552(a)(1), which provides:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy and interpretations of general applicability formulated and adopted by the agency[.]

Thus, to be subject to this requirement, the termination need only amount to a "statement of general policy." In fact, the termination is a "legislative rule" which meets and exceeds the definitional standards applicable to a "statement of general policy." *Cf. Batterton*, 648 F.2d at 709-10 n. 89 ("publication under [§ 552(a)], if anything, should be easier to secure than under [§ 553], given the language and purposes of the two statutes.") The centrally relevant finding here has already been made with respect to the rulemaking requirements of § 553: the action at issue represents a decision to cease providing direct health support services to a significant number of beneficiaries, and as such effects "a direct and significant impact upon the substantive rights of the general public or a segment thereof." *Lewis*, 415 F. Supp. at 659; *cf. Batterton*, 648 F.2d at 708 n.83. This is a case involving the "substantive right" of Indians to continue receiving the health care services and other support hitherto furnished to them by the very agencies created to fulfill that mission. *See Andrus*, 667 F.2d at 939 ("when depriving the Indians of benefits that have long been provided them, the government must 'bend over backwards' to assure fair treat-

ment."). In addition, the termination decision implicates the agencies' responsibility in "creating reasonable classifications and eligibility requirements to aid in allocating limited funds for Indian welfare services," *Lewis*, 415 F. Supp. at 659 (citing *Morton*, 415 U.S. at 230-31 (1973)), and its publication serves as a check against arbitrariness and as a guide for public expectations, *id.* at 660-61.

Finally, this Court's conclusion that the perfunctory termination of the Program was procedurally inadequate is bolstered by the special solicitude the Supreme Court has prescribed in those situations in which an agency decision amounts to a *change of course*:

> [R]evocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to proper course. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 41-42 (1983); *see also Robbins*, 616 F. Supp. at 1275 ("such a requirement . . . is necessary to protect the honor and integrity of government" and is not limited to published rules and regulations.). The case at bar, both according to the record and by Defendants' own admissions, involves just such an agency "change of course."

Given this Court's conclusion that the termination action was subject to procedural requirements which it undisputedly failed to meet, Plaintiffs' bid for substantive review of the merits of the termination presents no question ripe for this Court's decision, *see Bellarno*, 678 F. Supp. at 416; *see also Lewis*, 415 F. Supp. at 662. Without the benefit of the enriched record resulting from proper public notice and comment at the administrative level, the Court would be called upon to "decide this issue in the abstract," for "[o]nly after these rule making procedures are completed is the court equipped to decide whether a legislative rule is arbitrary, capricious or issued in excess of statutory authority." *Id.* at 416. Alternatively, because an agency is not entitled to take final rulemaking action without first executing § 553 procedures, action not taken in this manner is untimely and must be deemed to remain subject to the agency's modification, recall, abandonment, or reconsideration —rendering judicial review premature. *Id.* Thus, instead of undertaking substantive review immediately, an appropriate course would be to declare the termination action invalid and order the Program reinstated. *See* 5 U.S.C. § 706(2)(D); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). Then, if a party wishes to challenge substantively any future termination of the Program, it may do so after the termination has been promulgated in a procedurally valid manner. *Cf. Batterton*, 648 F.2d at 711.

The Court concludes and declares that the decision to terminate the Indian Children's Program is ineffective for lack of publication in the Federal Register and for noncompliance with the rulemaking procedures of the APA. 28 U.S.C. § 2201; 5 U.S.C. §§ 706(2)(D), 552(a)(1), 553; *see also Lewis*, 415 F. Supp. at 661. For reasons discussed *supra*, the Court today need not and does not reach any of the parties' many remaining arguments, including Plain-

tiffs' constitutional attacks and their apparent attempt to proceed directly under the doctrine setting forth the federal trust duty to Indians.

Logic favors immediate reinstatement of a program terminated in violation of law. *Cf. Alexander v. Hillman*, 296 U.S. 222 (1935). Plaintiffs seek this result as part of the injunctive relief they request in the Complaint. However, because Plaintiffs' motion for summary judgment is a partial one limited to their requests for declaratory relief, Plaintiffs have developed no argument addressed to the issuance of an injunction—with the result that Defendants have had no meaningful opportunity to oppose one. Accordingly, the Court is constrained to order supplemental briefing on this issue before proceeding further. *See* 28 U.S.C. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.").

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss for Lack of Jurisdiction and in the Alternative For Summary Judgment, and that same Motion as joined and supplemented by Interior Defendants, be, and hereby is, DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Partial Summary Judgment is GRANTED insofar as the Court declares that the decision to terminate the Indian Children's Program is unlawful, and therefore ineffective, for lack of publication in the Federal Register

and for noncompliance with the rulemaking procedures of the Administrative Procedure Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within fifteen days from the date of this Memorandum Opinion and Order, the parties shall submit supplemental briefs addressed solely to the question whether an injunction should issue compelling reinstatement of the Indian Children's Program as it existed and functioned immediately prior to its termination in 1985.

DATED this 5th day of July, 1990.

/s/ Juan G. Burciaga
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 86-1182-JB

GROVER VIGIL and CHARLENE VIGIL as General Guardians and Next Friends for ASHLEY VIGIL, a minor person,

—and—

KEE SANDOVAL and JUDY SANDOVAL as General Guardians and Next Friends for KRISTOFFERSON SANDOVAL, a minor person,

—and—

ANGELA C. ALLEN, as General Guardian and Next Friend for ANGELO ALLEN, a minor person, individually and on behalf of all other persons similarly situated, PLAINTIFFS,

v.

EVERETT R. RHOADES, M.D., Director of the Indian Health Service, his agents, employees, and successors; OTIS R. BOWEN, Secretary of the Department of Health and Human Services, his agents, employees, and successors; THE DEPARTMENT OF HEALTH AND HUMAN SERVICES; DONALD O. HODEL, Secretary of the Department of the Interior, his agents, employees, and successors; ROSS SWIMMER, Assistant Secretary of the Interior-Indian Affairs, Bureau of Indian Affairs, United States Department of the Interior, his agents, employees, and successors; THE DEPARTMENT OF THE INTERIOR; and the UNITED STATES OF AMERICA, DEFENDANTS.

MEMORANDUM OPINION AND ORDER

[Filed Aug. 28, 1990]

THIS MATTER is before the Court on the Supplemental Memoranda filed by Plaintiffs and Defendants pursuant to this Court's July 6, 1990 Memorandum Opinion and Order ["July 6 Opinion"] in which the parties were directed to tender additional submissions addressed solely to the question whether an injunction should issue compelling reinstatement of the Indian Children's Program ["Program"] as it existed and functioned immediately prior to its termination in 1985. The relevant facts were set forth in the July 6 Opinion and need not be repeated. Having reviewed the pleadings, the evidence of record and the relevant law, the Court now determines, in its discretion, that the decree contemplated in the July 6 Opinion will be entered.

Preliminarily, even before reaching the analysis that traditionally governs questions of equitable relief, the case for the injunction is compelling. Absent a decree compelling reinstatement of the Program, the significance of the declaratory relief already ordered by the Court would be more symbolic than real —a state of affairs which would contravene the bedrock remedial principle that courts should "decree complete relief." *Alexander v. Hillman*, 296 U.S. 222, 242 (1935). In addition, the ongoing illegality that arose from the Program's improper termination, *Vigil v. Rhoades*, No. 86-1182-JB, Memorandum Opinion and Order (D.N.M. July 6, 1990), cannot rationally be deemed cured without the Program being again in

operation. Indeed, this straightforward notion is implicit at several points in the statutory schemes applicable here and in the cases elaborating them. *See, e.g.*, 5 U.S.C. § 706(2)(D) ("court *shall* . . . set aside [procedurally invalid] agency action") (emphasis added); 28 U.S.C. § 2202; *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977); *Prows v. United States Department of Justice*, 704 F. Supp. 272 (D.D.C. 1988); *Lewis v. Weinberger*, 415 F. Supp. 652 (D.N.M. 1976); *see also Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 819 (1987) (where the requirements of the Administrative Procedure Act are not met, a court can properly vacate the offending rule and restore the *status quo ante*).

In fact, the same ultimate result follows under the traditional equity analysis regarding which the parties have now had opportunity to submit fuller argument. A request for injunctive relief is addressed to the Court's discretion. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). To focus this discretion, courts have inquired, first, whether the movant has demonstrated the lack of an adequate remedy at law. *See, e.g., Beacon Theatres v. Westover*, 359 U.S. 500, 506-07 (1959). Typically, the movant demonstrates the inadequacy of any legal remedy by showing that it will suffer irreparable harm if the Court does not intervene and prevent the impending inquiry. *Cf. City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310 (10th Cir. 1985); *see also Otero Savings and Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981) ("irreparable injury" showing required for preliminary injunction). Having found that Plaintiffs have succeeded on the merits of their underlying claim that termination of the Program was procedurally invalid, *Vigil v. Rhoades*, Civil No. 86-1182-JB, Memorandum Opinion and Order at 28-30 (D.N.M. July 6, 1990), the Court can next proceed to the determination whether the balance of equities favors the granting of injunctive relief, whether an injunction would be adverse to the public interest, and what particular form any injunctive relief should take. *See Sierra Club v. Alexander*, 484 F. Supp. 455, 471 (N.D.N.Y. 1980), *aff'd*, 633 F.2d 206 (2d Cir. 1980); *see also Otero Savings and Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275 (10th Cir. 1981) (preliminary injunction).

Plaintiffs have produced abundant and uncontroverted evidence that the Plaintiff class has suffered and will continue to suffer irreparable harm—in particular, impaired health and development—without the services the former Program provided. Moreover, failure to reinstate the Program would irreparably harm Plaintiffs' interest in ensuring that the integrity of the administrative rulemaking process is maintained and that they are afforded a meaningful opportunity to comment before implementation of rules such as that which terminated the Program. *See Community Nutrition Institute v. Butz*, 420 F. Supp. 751, 757 (D.D.C. 1976); *Dow Chemical, USA v. Consumer Product Safety Commission*, 459 F. Supp. 378, 395, *on rehearing*, 464 F. Supp. 904 (W.D. La. 1978). Both of these interests of Plaintiff class are also specific embodiments of weighty and well-established public interests. *See* 25 U.S.C. § 13; 25 U.S.C. § 1602; *Morton v. Ruiz*, 415 U.S. 199, 232, 236 (1974); *Dow Chemical*, 459 F. Supp. at 395.

As to balancing the equities, Defendants make no viable showing that reinstatement of the Program would effect any hardship—to themselves or to the

general public—outweighing the principal benefit of such reinstatement: furtherance of Plaintiffs' interest in obtaining the fullest possible array of essential diagnostic, evaluation, treatment planning and therapy services. Defendants' supplemental brief is preoccupied with attacking the July 6 Opinion, at the notable expense of its treatment of the specific question on which the Court had ordered further submissions. Defendants' attempt to reargue their case before this Court is as unavailing[1] as it is inappropriate.

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[1] The Court observes in passing that Defendants both ignore and mischaracterize the reasoning in the July 5 Opinion. For example, Defendants squander several pages taking the Court to task in the apparent and mistaken belief that the Court relied *solely* on its findings concerning the impact of the rule in determining it to be legislative. In so doing, moreover, Defendants fail to take account of case law in which the impact of a rule was not deemed "irrelevant" to the determination whether notice and comment requirements ultimately applied. *See, e.g., Carribean Produce Exchange, Inc. v. Secretary of Health and Human Services*, 893 F.2d 3, 8 (1st Cir. 1989) (citing *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1982)) ("substantial impact" is "a factor" particularly in assessing whether agency action sought to have "legislative" significance); *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (finding "substantial impact" not alone determinative, but citing as subject to notice and comment requirements the adoption of parole guidelines "calculated to have a substantial effect on ultimate parole decisions"); *Id.* at 1047 (focus of inquiry broader than, but still inclusive of, substantiality of impact); *Id.* at 1058-62 (Mikva, J., concurring in part and dissenting in part); *Prows v. United States Department of Justice*, 704 F. Supp. 272, 276-77 (D.D.C. 1988) (rulemaking procedures applicable where the action "substantially affect the rights of those subject to it"); *see also Vigil v. Andrus*, 667 F.2d 931, 939 (10th Cir. 1982) ("the BIA acted improperly in failing to follow APA rulemaking procedures before adopting changes affecting large numbers of Indian families").

On finally arriving at the issue framed by the Court, Defendants are content to flatly declare: "There are no Synder Act funds appropriated or available to Interior to fund a reinstated ICP." Defendants' Supplemental Brief at 15. This and Defendants' other bald declarations of agency incapacity must not and do not serve to bar entry of appropriate injunctive relief where, as here, the requisites for that relief are met. Moreover, the allegations of incapacity, as Defendants develop them, appear to be specific to the BIA.

Defendants do not say why reinstatement of the Program would entail redirection of any appropriated funds away from "the objects for which the appropriations were made." *Cf.* 31 U.S.C. § 1301(a). Indeed, Defendants vaguely inveigh against wrongful reallocation of "the above described funds which are direct service dollars" while producing virtually nothing in the way of specific facts or monetary figures to support their dire claims of "damage the proposed injunction may cause" them. *Cf. City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310, 312 (10th Cir. 1985). As their attempt to demonstrate such damage, Defendants have crafted a string of unsupported premises and conclusions. Defendants' terse pronouncements—for example, that "Interior defendants would have to terminate current direct educational handicapped services in Papago, Albuquerque, Navajo, Phoenix with several BIA schools, P.L. 93-638 contract schools and P.L. 100-297 grant schools that provide direct educational handicapped services to the BIA eligible population of handicapped Indian children"—appear to rely principally on equally conclusory recitations in the affidavit of Dr. Edwin Cobb. Similarly unfounded is Defendants' lament that "[i]n

order to finance the reestablishment of the BIA portion of ICP, BIA would have to recoup EHA [Education of the Handicapped Act] funds as identified in the application of the local educational area and agencies that service the former ICP population."

Significantly, Defendants mount no effective attack on Plaintiffs' showing that the current array of health care support services available and actually provided to handicapped Indian children does not amount to the equivalent of the unlawfully terminated Indian Children's Program—that members of Plaintiff class are currently receiving less of, or are doing without, a number of services the Program used to provide. It would defy logic to infer that these deficits do not matter simply because the current web of support services might in certain other respects provide more or better care than the Program did. In addition, Defendants do not refute Plaintiffs' proposition that their own resources, as individuals, are more severely constrained than those of the agencies and hence less adequate to the task of securing the relief for which they have demonstrated a need.

Defendants allude to other perceived impediments to a decree reinstating the Program: the prospect of changing the *status quo*, the threat of forced termination of other "handicapped service programs" provided pursuant to statutory schemes, the burden of hearings necessitated by curtailment of existing services, and a need to solicit competitive bids in restoring the Program. Yet Defendants marshal neither facts nor well-grounded legal argument in support of these feared effects and, certainly without such support, none of them would suffice to bar the decree at issue. Finally, Defendants' elliptical argument that *laches* is somehow implicated by Plaintiffs' filing an action a

year after the termination, and therein requesting permanent but not temporary injunctive relief, lacks adequate support in any of their cited cases and is without merit.

It is curious—indeed, incongruous—that Defendants should predicate their premonitions of widescale disaster among existing support structures simply upon the reinstatement of a program that they themselves characterize as "a small staff of IHS headquarters and BIA contract supported professionals and administrative support personnel varying in number from approximately 11 to 16 people." Defendants' Supplemental Brief at 4. In this light, and in view of the terseness and generality of their assertions of potential damage, Defendants' attempt to establish "undue hardship" is disingenuous and wholly unconvincing.

Finally, notwithstanding the redress that the APA scheme clearly commands in this matter, Defendants make no real effort to show either factually or logically that *no* equitable relief could be fashioned that would operate to restore the *status quo ante* without entailing the ills (duplication and deprivation of since-initiated services) they perfunctorily recite. Yet the Court today fashions a decree that bars both needless duplication and curtailment of currently provided services.

The Court shall grant Plaintiffs' request for an injunction reinstating the Indian Children's Program and shall deny Defendants' unsupported request for "a stay pending appeal of the Court's decision." Under Federal Rule of Civil Procedure 65(d), an order granting an injunction "shall be specific in terms" and "shall describe in reasonable detail . . . the act or acts" to be enjoined, so that parties will have ade-

quate notice of what they must do to comply with or implement the injunction. *See Williams v. United States*, 402 F.2d 47 (10th Cir. 1967).

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant agencies, jointly, by and through Defendant executive officers of these agencies, the Secretary of the Interior and his successors, the Secretary of Health and Human Services and his successors, the Director of the Indian Health Service and his successors, and the Assistant Secretary of the Interior-Indian Affairs and his successors, are hereby enjoined—

1. To reconstitute the Indian Children's Program ["Program"] as it existed and functioned immediately prior to its termination in 1985, and in so doing—

a. To procure the functional equivalent, in number and qualifications, of the former staff of the Program, thereby providing Plaintiffs with a multi-disciplinary team of the same professional credentials, calibre, and staff size as was provided under the former Program; and,

b. To provide Plaintiffs, through the reconstituted Program, with the same services, in type, range, quality, and manner of delivery, as were provided under the former Program;

and,

2. To accomplish this restoration of the Program within 180 days from the date of entry of this decree; and,

3. To, within this 180-day period, contact all those children and their families who were being served by the former Program or were in active Program files at the time the former Program terminated services, notify them of the reinstatement of the Program, and provide them with the immediate opportunity to have their current condition assessed to determine how they may resume their relationship with the Program in the manner best suited to their optimum health and development; and,

4. To continue to operate the Program, as herein described, until such time as it is terminated in accordance with all applicable law.

Provided, that—

1. The reconstituted Program is not required to provide those services available to Plaintiff class, and actually provided to Plaintiff class, through any program in operation under the Education of the Handicapped Act, 20 U.S.C. § 1401 *et seq.*, ["EHA program"] during the time periods that any such EHA program actually provides such services to Plaintiff class; and,

2. At no time hereafter are any EHA program services to be impaired or curtailed on account of any activity undertaken in reconstituting or operating the Program or in performing any other duties under this Decree; and,

3. Defendants are at all times hereafter to perform their duties under this decree with such care, skill, and efficiency as will enable them to minimize disruptions in the provision and de-

livery of services under existing programs and to maximize availability and accessibility of the totality of applicable health care support services to Plaintiff class.

DATED this 28th day of August, 1990.

/s/ Juan G. Burciaga
Chief Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

1. The Snyder Act, 25 U.S.C. 13:

§ 13. Expenditure of appropriations by Bureau of Indian Affairs

The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education.

For relief of distress and conservation of health.

For industrial assistance and advancement and general administration of Indian property.

For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.

For the enlargement, extension, improvement, and repair of the buildings and grounds of existing plants and projects.

For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges, and other employees.

For the suppression of traffic in intoxicating liquor and deleterious drugs.

For the purchase of horse-drawn and motor-propelled passenger-carrying vehicles for official use.

And for general and incidental expenses in connection with the administration of Indian affairs.

Notwithstanding any other provision of this section or any other law, postsecondary schools admin-

istered by the Secretary of the Interior for Indians, and which meet the definition of an "institution of higher education" under section 1201 of the Higher Education Act of 1965 [20 U.S.C.A. § 1141], shall be eligible to participate in and receive appropriated funds under any program authorized by the Higher Education Act of 1965 [20 U.S.C.A. § 1001 et seq.] or any other applicable program for the benefit of institutions of higher education, community colleges, or postsecondary educational institutions.

2. Title II of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1621 (1982):

SUBCHAPTER II—HEALTH SERVICES

§ 1621. Direct patient care program

(a) Purpose and duration

For the purpose of eliminating backlogs in Indian health care services and to supply known, unmet medical, surgical, dental, optometrical, and other Indian health needs, the Secretary is authorized to expend, through the Service, over the seven-fiscal-year period beginning after September 30, 1976, the amounts authorized to be appropriated by subsection (c) of this section. Funds appropriated pursuant to this section for each fiscal year shall not be used to offset or limit the appropriations required by the Service under other Federal laws to continue to serve the health needs of Indians during and subsequent to such seven-fiscal-year period, but shall be in addition to the level of appropriations provided to the Service under this chapter and such other Federal laws in the preceding fiscal year plus an amount equal to the amount required to cover pay increases and employee benefits for personnel employed under

this chapter and such laws and increases in the costs of serving the health needs of Indians under this chapter and such laws, which increases are caused by inflation.

(b) Employment of personnel during seven-fiscal-year period

The Secretary, acting through the Service, is authorized to employ persons to implement the provisions of this section during the seven-fiscal-year period in accordance with the schedule provided in subsection (c) of this section. Such positions authorized each fiscal year pursuant to this section shall not be considered as offsetting or limiting the personnel required by the Service to serve the health needs of Indians during and subsequent to such seven-fiscal-year period but shall be in addition to the positions authorized in the previous fiscal year.

(c) Amounts and positions authorized for certain specific purpose; authorization of appropriations

The following amounts and positions are authorized, in accordance with the provisions of subsections (a) and (b) of this section, for the specific purposes noted:

(1) Patient care (direct and indirect): sums and positions as provided in subsection (e) of this section for fiscal year 1978, $8,500,000 and two hundred and twenty-five positions for fiscal year 1979, and $16,200,000 and three hundred positions for fiscal year 1980. There are authorized to be appropriated $20,250,000 for the fiscal year ending September 30, 1981, $23,000,000 for the fiscal year ending September 30, 1982, $26,500,000 for the fiscal year ending

September 30, 1983, and $30,500,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(2) Field health, excluding dental care (direct and indirect): sums and positions as provided in subsection (e) of this section for fiscal year 1978, $3,350,000 and eighty-five positions for fiscal year 1979, and $5,500,000 and one hundred and thirteen positions for fiscal year 1980. There are authorized to be appropriated $6,400,000 for the fiscal year ending September 30, 1981, $7,350,000 for the fiscal year ending September 30, 1982, $8,450,000 for the fiscal year ending September 30, 1983, and $9,700,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(3) Dental care (direct and indirect): sums and positions as provided in subsection (e) of this section for fiscal year 1978, $1,500,000 and eighty positions for fiscal year 1979, and $1,500,000 and fifty positions for fiscal year 1980. There are authorized to be appropriated $1,875,000, for the fiscal year ending September 30, 1981, $2,150,000 for the fiscal year ending September 30, 1982, $2,500,000 for the fiscal year ending September 30, 1983, and $2,875,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(4) Mental health: (A) Community mental health services: sums and positions as provided in subsection (e) of this section for fiscal year

1978, $1,300,000 and thirty positions for fiscal year 1979, and $2,000,000 and thirty positions for fiscal year 1980. There are authorized to be appropriated $2,500,000 for the fiscal year ending September 30, 1981, $2,875,000 for the fiscal year ending September 30, 1982, $3,300,000 for the fiscal year ending September 30, 1983, and $3,800,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(B) Inpatient mental services: sums and positions as provided in subsection (e) of this section for fiscal year 1978, $400,000 and fifteen positions for fiscal year 1979, and $600,000 and fifteen positions for fiscal year 1980. There are authorized to be appropriated $750,000 for the fiscal year ending September 30, 1981, $870,000 for the fiscal year ending September 30, 1982, $1,000,000 for the fiscal year ending September 30, 1983, and $1,150,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(C) Model dormitory mental health services: sums and positions as provided in subsection (e) of this section for fiscal year 1978, $1,250,000 and fifty positions for fiscal year 1979, and $1,875,000 and fifty positions for fiscal year 1980. There are authorized to be appropriated $2,350,000 for the fiscal year ending September 30, 1981, $2,700,000 for the fiscal year ending September 30, 1982, $3,100,000 for the fiscal year ending September 30, 1983, and $3,600,000 for the fiscal year ending September 30, 1984,

and such further positions are authorized as may be necessary for each such fiscal year.

(D) Therapeutic and residential treatment centers: sums and positions as provided in subsection (e) of this section for fiscal year 1978, $300,000 and ten positions for fiscal year 1979, and $400,000 and five positions for fiscal year 1980. There are authorized to be appropriated $460,000 for the fiscal year ending September 30, 1981, $525,000 for the fiscal year ending September 30, 1982, $600,000 for the fiscal year ending September 30, 1983, and $690,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(E) Training of traditional Indian practitioners in mental health: sums as provided in subsection (e) of this section for fiscal year 1978, $150,000 for fiscal year 1979, and $200,000 for fiscal year 1980. There are authorized to be appropriated $250,000 for the fiscal year ending September 30, 1981, $285,000 for the fiscal year ending September 30, 1982, $325,000 for the fiscal year ending September 30, 1983, and $375,000 for the fiscal year ending September 30, 1984.

(5) Treatment and control of alcoholism among Indians: $4,000,000 for fiscal year 1978, $9,000,000 for fiscal year 1979, and $9,200,000 for fiscal year 1980. There are authorized to be appropriated $16,500,000 for the fiscal year ending September 30, 1981, $19,000,000 for the fiscal year ending September 30, 1982, $22,000,000 for the fiscal year ending September 30, 1983, and $25,100,000 for the fiscal year ending September 30, 1984.

(6) Maintenance and repair (direct and indirect): sums and positions as provided in subsection (e) of this section for fiscal year 1978, $3,000,000 and twenty positions for fiscal year 1979, and $4,000,000 and thirty positions for fiscal year 1980. There are authorized to be appropriated $5,000,000 for the fiscal year ending September 30, 1981, $5,750,000 for the fiscal year ending September 30, 1982, $6,600,000 for the fiscal year ending September 30, 1983, and $7,600,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(d) Research fund; amount required to be expended

The Secretary, acting through the Service, shall expend directly or by contract not less than 1 per centum of the funds appropriated under the authorizations in each of the clauses (1) through (5) of subsection (c) of this section for research in each of the areas of Indian health care for which such funds are authorized to be appropriated.

(e) Authorization of appropriations

For fiscal year 1978, the Secretary is authorized to apportion not to exceed a total of $10,025,000 and 425 positions for the programs enumerated in clauses (c)(1) through (4) and (c)(6) of this section.

8. Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency

shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

4. Act of Nov. 27, 1979, Pub. L. No. 96-126, Tit. II, 93 Stat. 954, 973-974:

An Act

Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1980, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1980, and for other purposes, namely:

* * * * *

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

HEALTH SERVICES ADMINISTRATION

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and V and section 757 of the Public Health Service Act, including hire of passenger motor vehicles and aircraft; purchase of reprints; payments for telephone service in private residences in the field, when authorized under regulations approved by the Secretary, $538,874,000: *Provided*, That funds made available to tribes and tribal organizations through grants and contracts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450) shall remain available until September 30, 1981.

INDIAN HEALTH FACILITIES

For construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites; purchase and erection of portable buildings; purchase of trailer; and for provision of domestic and community sanitation facilities for Indians, as authorized by section 7 of the Act of August 5, 1954 (42 U.S.C. 2004a), the Indian Self-Determination Act and the Indian Health Care Improvement Act, $74,302,000, to remain available until expended: *Provided*, That not to exceed $20,000,000 of the amounts collected by the Secretary of Health, Education, and Welfare under the authority of title IV of the Indian Health Care Improvement Act shall be available until September 30, 1981, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, construction of new facilities, or major renovation of existing Indian Health Service facilities).

ADMINISTRATIVE PROVISION,
HEALTH SERVICES ADMINISTRATION

Appropriations in this Act to the Health Services Administration, available for salaries and expenses, shall be available for services as authorized by 5 U.S.C. 3109 but at rates not to exceed the per diem equivalent to the rate for GS-18, for uniforms or allowances therefore as authorized by law (5 U.S.C. 5901-5902), and for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or

management of those functions or activities: *Provided*, That none of the funds appropriated under this Act to the Indian Health Service shall be available for the lease of permanent structures without advance provision therefor in appropriations Act.

* * * * *

5. Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1837, 1863-1865:

Joint Resolution

Making continuing appropriations for the fiscal year 1985, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HEALTH SERVICES ADMINISTRATION

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and V and section 338G of the Public Health Service Act with respect to the Indian Health Service, including hire of passenger motor vehicles and aircraft; purchase of reprints, purchase and erection of portable buildings, payments for telephone service in private residences in the field, when authorized under regulations approved by the Secretary, $809,927,000: *Provided*, That funds made available to tribes and tribal organizations through

grants and contracts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall remain available until September 30, 1986. Funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available until September 30, 1986, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning,, design, construction of new facilities, or major renovation of existing Indian Health Service facilities): *Provided further*, That funding contained herein, and in any earlier appropriations Act, for scholarship programs under section 103 of the Indian Health Care Improvement Act and section 757 of the Public Health Service Act shall remain available for expenditure until September 30, 1986.

INDIAN HEALTH FACILITIES

For construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites, purchase and erection of portable buildings, purchases of trailers and for provision of domestic and community sanitation facilities for Indians, as authorized by section 7 of the Act of August 5, 1954 (42 U.S.C. 2004a), the Indian Self-Determination Act and the Indian Health Care Improvement Act, $62,892,000, to remain available until expended.

ADMINISTRATIVE PROVISIONS,
HEALTH SERVICES ADMINISTRATION

Appropriations in this Act to the Health Services Administration, available for salaries and expenses, shall be available for services as authorized by 5 U.S.C. 3109 but at rates not to exceed the per diem equivalent to the rate for GS-18, and for uniforms or allowances therefor as authorized by law (5 U.S.C. 5901-5902), and for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of those functions or activities: *Provided*, That none of the funds appropriated under this Act to the Indian Health Service shall be available for the initial lease of permanent structures without advance provision therefor in appropriations Acts: *Provided further*, That non-Indian patients may be extended health care at all Indian Health Service facilities, if such care can be extended without impairing the ability of the Indian Health Service to fulfill its responsibility to provide health care to Indians served by such facilities and subject to such reasonable charges as the Secretary of Health and Human Services shall prescribe, the proceeds of which shall be deposited in the fund established by sections 401 and 402 of the Indian Health Care Improvement Act: *Provided further*, That funds appropriated to the Indian Health Service in this Act, except those used for administrative and program direction purposes, shall not be subject to limitations directed at curtailing Federal travel and transportation: *Provided further*, That with the exception of service

units which currently have a billing policy, the Indian Health Service shall not initiate any further action to bill Indians in order to collect from third-party payers nor to charge those Indians who may have the economic means to pay unless and until such time as Congress has agreed upon a specific policy to do so and has directed the IHS to implement such a policy: *Provided further*, That hereafter the Indian Health Service may seek subrogation of claims including but not limited to auto accident claims, including no-fault claims, personal injury, disease, or disability claims, and workman's compensation claims except as otherwise limited by the fourth proviso of this section: *Provided further*, That hereafter, notwithstanding any other law, an Indian tribe may acquire and expend funds, other than funds appropriated to the Service, for major renovation and modernization, including planning and design for such renovation and modernization of Service facilities, including facilities operated pursuant to contract under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) subject to the following conditions:

(1) the implementation of such project shall not require or obligate the Service to provide any additional staff or equipment;

(2) the project shall be subject to the approval of the Area Director of the Service area office involved;

(3) the tribe shall have full authority to administer the project, but shall do so in accordance with applicable rules and regulations of the Secretary governing construction or renovation of Service health facilities; and

(4) no project of renovation or modernization shall be authorized herein if it would require the diversion of Service funds from meeting the needs of projects having a higher priority on the current health facilities priority system.

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